# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~327~~ 128

ISAAC A. DAVENPORT, APPELLANT,

vs.

JOHN R. LAMB, EMMA S. LAMB, IDA SQUIRES, AND HER GUARDIAN, WILLIAM E. COOPER, JAMES P. O. LOWNESDALE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED DECEMBER 5, 1870.

# Supreme Court of the U. S.

BALIE PEYTON, *Appellant*
*against*
G. HEINEKEN & GEORGE W. PALMORE, *Appellees.*

Appeal from decree of the Circuit Court of the U. S., for the Middle District of Tennessee.

*Abstract of the case.*

On the 11th of July, ~~1870~~ 1868, the contract was made, which is pp. 3 and 4, and is admitted by the appellant in his answer, p. 5. The bill of the appellees states that by virtue of that contract, and to comply with their promise and undertaking, they did from time to time advance money to the appellant, and which, (including the value of 500 seamless bags sent to him and a balance of interest $263.06,) amounted in the aggregate to $18,533.14; that he shipped to them flour to be sold, to wit: in September, 1868, 481 barrels, and in October of same year 551 barrels; and this was all the flour he ever sent to them; that this flour was sold and the net proceeds carried to his credit, leaving him in debt to them $10,034.95, with interest from December 1, 1868, at 7 per cent. that being the legal interest of New York; that he has refused to pay the same on the ground that the account is

not exactly correct; that they, (the appellees) think it is correct; but inasmuch as the account is not altogether satisfactory to him, they have thought it just to him and proper to come into a Court of Equity, and ask that an account be taken, and the exact amount ascertained, previous to a sale of the property mentioned in the contract instead of giving the 20 days' notice, and selling as thereby authorized. Accordingly the bill against him prays that an account be ordered and the amount ascertained, and a decree made for the sale of the property embraced in the contract free from the equity of redemption, and the proceeds applied to the payment of the debt.

The cause was heard on the bill, the answer (p. 5 to 7,) and the contract; and on the 19th of May, 1869, a decree was entered pp. 7, 8, whereby after stating the case as it then appeared to the Court, it was "decreed with the *consent* of the parties, that it be referred to Robert W. Pritchett, as Commissioner, to take and state the account."

Testimony having been taken on the part of complainants, (p. 8 to 19,) and on the part of defendant, (p. 19 to 32,) the Commissioner made a report, (p. 33 to 35.) The cause was heard the 11th of May, 1870, upon a new report, (p. 35 to 38,) and upon exceptions by complainants (pp. 38, 39,) and exceptions by defendant, (pp. 39, 40.) The Court was of opinion "that the 1st and 3d exceptions taken by the complainants are not well taken, and ought to be disallowed; but that the 2d exception to said report by the complainants is well taken and ought to be allowed;" and was "further of opinion that the 1st, 2d,

# Supreme Court of United States.

DECEMBER TERM, 1871.

No. 127.

BALIE PEYTON, *appellant*,
*against*
G. HEINEKEN & G. W. PALMORE, *appellees*.

From decree of Circuit Court of United States for middle district of Tennessee.

*Reply to Mr. Cooper's printed note.*

I. On the face of the writing, (p. 3,) it appears that "commission merchants of the city and State of New York, from time to time as required agree to advance" money; and that they "are to receive the legal interest of the State of New York for advances, and 2½ per cent. commissions on sales." It was contemplated that such advances would be made in New York, and would be repaid there; and such repayment would be mainly, perhaps entirely, out of sales to be made there on commission. In this, there is no usury. 1 Rob. Pract., ch. 17, § 1, 2, pp. 81, to 84. The plaintiffs, are entitled to, and properly claim interest upon the sums advanced by them, according to the rate of interest in New York. The defendant must be considered as indebted to the plaintiffs in New York the moment the money was advanced. *Winthrop* v. *Carleton*, 12 Mass., 4; *Lanusse* v. *Barker*, 3 Wheat., 146; *Ralph* v. *Brown*, 3 W. & S., 395;

*Miller* v. *Tiffany*, 1 Wallace, 310. This is according to to the general rule of law; and the law of Tennessee is not different. The Supreme Court of that State has held recently (so late as 1868,) "upon a thorough consideration of the question, that a contract made in Tennessee to pay money in another State, and at a rate of interest authorized by the laws of such State, is valid and will be enforced in the courts of Tennessee, although such rate of interest was usurious under the laws of Tenessee, unless it be made to appear that the place of payment in the other State was stipulated, and arranged for the purpose of avoiding and violating the usury law of Tennessee." *Parham* v. *Pulliam*, 5 Coldwell, 506.

Here the defendant in his answer "*admits the contract*," (p. 5,) without pretending there was any such stipulation or arrangement as it would be necessary to show to make the contract usurious; and it was "decreed *with the consent* of the parties that it be referred to R. W. P., as commissioner to take and state the account." (p. 8.)

II. Writings with far less of certainty in the description of the real estate than appears in the instrument, p. 3, have been held sufficient. *Johnson* v, *Ronald's administrator and heirs*, 4 Manf., 77; *Smith* v. *Jones*, 7 Leigh, 165. It is enough that there be in the writing "reasonable certainty, either by its own terms or by reference to some other deed, record or other matter from which it can be ascertained with like reasonable certainty." Of the writing before the Supreme Court of Massachusetts in 1834, *Shaw*, C. J., said: "It refers definitely to facts, familiarly known to the parties, and in all probability well understood by them; *the estate is well described as the same estate which Atwood had before sold to Cobb.*" *Atwood* v. *Cobb*, 16 Pick., 230. Courts on both sides of the Atlantic act upon the maxim, *Id certum est quod certum reddi potest.*

*Owen* v. *Thomas*, 3 Myln & Keen, 356; Sugd. on Vend., p. 135, of 14th Lond. edi.

The defendant not having sought any inquiry on the subject, in effect admits that if there be any uncertainty as to the subject of the agreement, it would be removed by referring to those deeds therein mentioned.

If unexpectedly any difficulty shall arise in ascertaining the lands to be sold, the master's report will enable the court to act properly on the subject. It is not to be assumed in advance that there will be any such difficulty.

III. The statute on pp. 565, 566, of statute law of Tennessee by Caruthers & Nicholson, seems inapplicable to the case. A decree to sell the lands for cash would have been less in accordance with the course of Courts of Equity than the decree to sell on a reasonable credit. *Haffeg's heirs* v. *Birchetts*, 11 Leigh, 83; *Brien* v. *Pittman & Co.*, 12 Id. 379; *Wade's heirs* v. *Greenwood*, 2 Rob. Va. R., 475. It may be inferred that the appellant really preferred the sale to be on credit; but no objection is perceived to the court's making (without reversal) such explanation or addition as will authorize the court below, on application, by him (within a reasonable time) to direct it to be for cash.

IV. As to the exceptions. The court properly sustained plaintiff's 2d exception, p. 39, as to the item of $40 mentioned, p. 5. For the draft of $4,000 was paid by them in New York, and they were entitled to credit for that sum of $4,000, as an advance by them from the time that draft was paid.

They are not allowed such interest as they were entitled to. For the whole balance of $10,034 05 mentioned, p. 11, being due 1st December, 1868, they should have been allowed interest on it from that time. But this has not been done. For when to the $10,034 05, there was added $43 94, as of the 29th of February, 1869, making

together $10,077 99. (p. 18,) the commissioner should have allowed interest on the $10,034 05, from the 1st of December, 1868, and on the $43 94 from the 29th of February, 1869, whereas the interest on the whole is only from the last date, (p. 36.) And so in respect to interest there is a material error to the prejudice of the appellees.

The sum of $10,034 05, having been reduced by giving the defendant credit for the proceeds of the flour shipped at Atlanta, (p. 19 and p. 37,) it was proper to allow plaintiffs commission thereon, and therfore defendant's first exception, (p. 39,) is properly overruled.

What is said in the commissoner's report, p. 36, is a sufficient answer to defendant's 2d and 3d as well as his 4th exception.

*March*, 1872. CONWAY ROBINSON,
*Counsel for Appellees.*

3d, and 4th exceptions of the defendant to said report are not well taken and ought to be overruled and disallowed; but that the 5th exception taken by the defendant to the extent of $100, and his 6th and 7th exceptions are well taken;" and it decreed accordingly, (pp. 39, 40.)

POINTS.

1. Error was committed to the prejudice of the appellees, but to some extent the injury is obviated by the '*consent*' of the appellant made a part of the decree. There is no error of which he has a right to complain.

2. The decree being for the payment of money, and the appeal delaying the proceedings thereon, and appearing to have been taken merely for delay, damages at the rate of *ten per cent.*, in addition to interest, should be awarded upon the amount of the decree.

CONWAY ROBINSON,

*Counsel for Appellees.*

IN THE

# Supreme Court of the United States.

BALIE PEYTON, APPELLANT,

vs.

G. HEINEKEN AND G. W. PALMORE, APPELLEES.

The first error relied on is, that the deed of trust, upon which the proceedings are had, is void, for two reasons:

1st. Because there is no sufficient description of the land, attempted to be conveyed, as required by the statute of frauds. The description is uncertain, and the land incapable of being identified, so far as can be seen from this record.

Pipkin vs. James, 1 Humphreys, 325.
Stamps vs. Sheid, 2 Sneed, 175.

2d. Because the contract sought to be enforced is, upon its face, usurious. It stipulated for the payment of a greater rate of interest than that allowed by the laws of the State of Tennessee, the place of the contract, and also the place where it was to be performed.

The only evidence of indebtedness from defendant to complainants is found in the deed of trust. This was certainly executed in Tennessee, and can only be enforced in that state. The money was to be advanced to the defendant, who resided there. And it is expressly

stipulated in the deed itself that the money so advanced was to be used there. Where the usury appears upon the face of the contract it is void, and cannot be enforced in any court.

Isler vs. Bumpass, 6 Humphreys, 277.

The second cause relied upon as constituting error is found in the decree directing the sale of the land.

It is not specific enough; it would be difficult to tell from the decree what lands the master is directed to sell.

The decree substitutes other terms of sale than those mentioned in the deed of trust. By the deed the sale must be made for cash. If so made appellant would have two years from the sale within which to redeem his land, by repaying to the purchaser the amount bid, with interest.

Statutes of Tennessee by Nicholson and Caruthers, pages 525 and 526.

"The main object of the statute allowing redemption," say the court in Woods vs. McGarock, 10 Yerg., 138, "was to protect the rights and interests of the debtor—to secure to him the redemption of his land."

The same idea is reiterated in Pillow vs. Longtree, 5 Humphreys, 391.

The deed of trust was made with full knowledge of this wise and humane provision of our law. Does it not, therefore, become part of the contract itself? And can the court, when called upon to enforce the contract, ignore it, and decree as though no such provision existed?

Why should the debtor be deprived of this right or benefit conferred upon him by law, especially when he has done all he can, by contract stipulation, to preserve it to himself?

The circuit court in this case, having undertaken to decree a sale contrary to the terms and stipulations con-

tained in the trust-deed, and to substitute other terms much more onerous, and therefore prejudicial to the rights of the appellant, committed error which this court ought to correct.

Again, it is insisted that the circuit court committed error in its rulings upon the various exceptions filed to the report of the special commissioner.

1st. In allowing the second exception filed by complainants.

By the terms of the contract complainants agreed to furnish the defendant certain sums of money.

On the 28th of August, 1868, they furnished, instead of cash, a draft at thirty days, drawn by their agent in Tennessee, upon themselves in New York, for four thousand dollars.

This draft was discounted, and the appellant only realized thereon thirty-nine hundred and sixty dollars in cash.

The special commissioner, in his report, allows the appellant a credit for this difference, including interest thereon, of forty-four dollars and nineteen cents. The circuit court, upon exception filed by complainants to this item of credit, allow the same, and thereby charge the appellant with the full four thousand dollars and interest thereon.

The simple statement of the case is enough to show the error complained of.

Surely it is not right to charge the appellant with a draft at thirty days as though it was cash.

He contracted for money, and agreed to pay interest on money advanced. But he is made to receive paper which he could not use, except at a discount, as so much cash, upon which he pays interest.

The exception should have been disallowed, and the commissioner's report been permitted to stand, so far as this item was concerned.

The circuit court erred in not having allowed the 1st,

2d, and 3rd exceptions filed by the defendant to the report of the special commissioner.

The commissioner commences the account by charging the defendant with $10,077.99, as of the first of December, 1868, when the bill charges that the amount due that day was only $10,034.05.—(See bill, page 2 of the printed record.)

The exhibit No. 3, to the deposition of G. W. Palmore, (page 11, printed record,) shows the same amount to have been due on that day.

The second exception should have been allowed.

There is no proof showing that the amount allowed complainants for inland insurance was ever paid by them. The defendant gave no authority to take out any such insurance, and it was of no benefit to him. The liability of the common carrier for the safe transportation of the flour to New York, was amply sufficient to indemnify the defendant against loss.

The proof shows that it was not always charged by merchants in New York engaged in similar transactions.

(See exhibits to deposition of H. T. Massengale, pages 23, 24, 25, and 26 of the printed record.)

The same may be said as to the 3rd exception filed by defendant.

HENRY COOPER,
*Of Counsel for Appellant.*

# SUPREME COURT OF THE UNITED STATES.

## No. 327.

ISAAC A. DAVENPORT, APPELLANT,

vs.

JOHN R. LAMB, EMMA S. LAMB, IDA SQUIRES, AND HER GUARDIAN, WILLIAM E. COOPER, JAMES P. O. LOWNESDALE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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a DISTRICT OF OREGON, *ss.* :

In obedience to instructions duly received, I have served the within and annexed citation upon the within named Millard O. Lownsdale, by exhibiting the same to him, and by delivering to him personally, a true copy thereof, prepared and certified by Thomas G. Young, U. S. marshal for said district, at the city of Salem, in said district, the 8th day of August, 1870.

W'M S. BARKER,
*Deputy U. S. Marshal for said District.*

DISTRICT OF OREGON, *ss* :

In obedience to instructions duly received, I have served the within and annexed citation upon the within named John R. Lamb, Emma S. Lamb, his wife, and Ida Squires, by exhibiting the original, and by delivering a true copy thereof to their attorneys of record, Hill & Mulkey, and W. W. Page, severally and personally, on the 25th day of April, A. D. 1870, and by leaving at the office of the clerk of the United States circuit court for the district of Oregon a true copy thereof for each of the said appellees, John R. Lamb, Emma S. Lamb, his wife, and Ida Squires, on the 30th day of July, 1870; and I have duly served the said citation upon James P. O. Lownsdale, James P. O. Lownsdale, guardian of Millard O. Lownsdale, Ruth A. Lownsdale, (semple,) and John A. Blanchard, guardian of Ruth A. Lownsdale, by exhibiting to them the original, and by delivering to them, severally and personally, a true copy thereof, on the 4th day of August, A. D. 1870; and I have duly served the said citation upon William E. Cooper, guardian of Ida Squires,
b by exhibiting to him the original, and by delivering to him, personally, a true copy thereof, on the 5th day of August, A. D. 1870; and I have duly served the said citation upon Hannah Smith, for herself, and Hannah Smith as administratrix of Hiram Smith, deceased, by exhibiting to her the original, and by delivering to her personally, a true copy thereof, on the 12th day of August, A. D. 1870. All at Portland, in said district, on the days above stated.

THOMAS G. YOUNG,
*United States Marshal for the District of Oregon.*

c UNITED STATES OF AMERICA, *ss* :

To John R. Lamb, Emma S. Lamb, his wife, Ida Squires and her guardian William E. Cooper, James P. O. Lownsdale, Millard O. Lownsdale and his guardian, the said James P. O. Lownsdale, Ruth A. Lownsdale and her guardian John A. Blanchard, and Hannah Smith, for herself, and as administratrix of Hiram Smith, deceased, greeting:

You are hereby admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to an appeal allowed by the circuit court of the United States for the district of Oregon, and on file in the clerk's office of the said circuit court, wherein Isaac A Davenport is appellant and you are appellees, to show cause, if any there be, why the decree in the said appeal mentioned should not be reversed and corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 29 day of March, A. D. 1870.

MATTHEW P. DEADY,
*U. S. District Judge, Oregon.*

(Indorsed:) U. S. Supreme Court. Isaac A Davenport, appellant, vs. John R. Lamb et al. appellees. Citation. Filed March 29, 1870. Ralph Wilcox, clerk. Chapman, atto.

1 Be it remembered that, at a regular term of the circuit court of the United States for the district of Oregon, begun and held at the city of Portland, on Monday, the 6th day of January, A. D. 1868, present, Hon. M. P. Deady, judge of the district court of the United States, and on Friday, January 31st, being the 17th judicial day of said term, the following proceedings were had, to wit:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

Now, at this day, come the parties to the above-entitled cause, by their respective solicitors, as heretofore, and by consent of the parties hereto, it is ordered that the pleadings in this cause be set aside, and that the complainants have five days within which to file an amended bill of complaint, to stand as an original bill herein, and that the defendants have until five days thereafter to except, plead, or answer thereto; and, further, that either party have leave to take from the files the exhibits attached to the pleadings, to file with the new pleadings.

(S'd) MATHEW P. DEADY,
*Judge District Court.*

2 And, afterwards, to wit, on Tuesday, February 4th, A. D. 1868, being the 19th judicial day of aforesaid term of court, M. P. Deady, judge, among other the following proceedings were had; that is to say:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

Now, at this day, in this cause, it is ordered that the time for filing amended complaint herein be extended until Saturday next.

(S'd) MATHEW P. DEADY,
*Judge District Court.*

And afterwards, to wit, on February 8th, 1868, the following bill of complaint was filed in office of the clerk of aforesaid court:

In the circuit court of the United States for the district of Oregon.

JOHN R. LAMB, EMMA S. LAMB, AND IDA SQUIRES, complainants,
*vs.*
ISAAC A. DAVENPORT, J. P. O. LOWNSDALE, Millard O. Lownsdale, by his guardian James P. O. Lownsdale, Ruth A. Lownsdale, by
3 John Blanchard, her guardian, Mary E. Cooper, Hiram and Hannah M. Smith, defendants.

To the hon. the judges of the circuit court aforesaid:

John R. Lamb, Emma S. Lamb, and Ida Squires, complainants and citizens of the State of Kentucky, by this their complaint herein exhib-

ited against the defendants above named, all of whom are citizens of the State of Oregon, and reside therein, respectfully shows to the court that the matter in dispute in this suit, exclusive of costs, exceeds in value the sum of five hundred dollars.

That John R. Lamb is intermarried with Emma S. Lamb; that Emma S. Lamb and Ida Squires are daughters of Sarah Squires, now deceased.

That said Sarah Squires, deceased, was the daughter of Daniel H. Lownsdale, deceased; that D. H. Lownsdale intermarried with Nancy Gillihan, widow of William Gillihan, deceased, on the 10th of July, 1850; that D. H. Lownsdale, at the time of his marriage with the said Nancy Gillihan, had, by a former wife, three children, to wit, James P. O. Lownsdale, Mary E. Cooper, and Sarah Squires, now deceased; that said Daniel H. Lownsdale had, by his said wife, Nancy Lowns-
4 dale, two children, the defendants Millard O. Lownsdale, who is a minor, and has for his guardian James P. O. Lownsdale, and Ruth A. Lownsdale, a minor, who has for her guardian John Blanchard; that the said Nancy Gillihan, at the time of her said marriage with said Daniel H. Lownsdale, was the mother of two children, now living, by her former husband, to wit, William Gillihan, and Isabella Ellen Gillihan, who afterwards was intermarried with one William Potter.

That said Daniel H. Lownsdale departed this life on or about the 4th day of May, 1862, and left as his sole surviving heirs the complainants Emma S. Lamb, and Ida Squires, and James P. O. Lownsdale, Mary E. Cooper, Millard O. Lownsdale, Ruth A. Lownsdale, defendants herein.

That said Nancy Lownsdale departed this life on or about the 15th day of April, in the year 1854, leaving, as her sole surviving heirs, the said Daniel H. Lownsdale, William Gillihan, Isabella Ellen Gillihan, Millard O. Lownsdale, and Ruth A. Lownsdale; that the said Nancy Lownsdale died seized of an estate in fee, in and to the west half of the following-described tract of land, situate in the city of Portland, in the county of Multnomah and State of Oregon, being Donation Claim, No. (40,) forty, being parts of sections thirty-three, (33,) and thirty-
5 four, (34,) in township one (1) north, range one (1) east, and claim No. sixty-six, (66,) being parts of sections three, (3,) and four, (4,) in township one (1) south, range one (1) east, in the county of Multnomah, State of Oregon, being bounded and described as follows, to wit:

Beginning at a point in the west bank of the Willamette River, 37 links S. 4° west from the intersection of base line with said west bank of the river; thence N. 70° 15′ west 52 chains 89 links; thence north 89° west 23 chains 29 links; thence south 20° 15′ west 14 chains 45 links; thence south 60° 45′ east 58 chains 90 links; thence south 20° 45′ west 7 chains 40 links; thence south 15′ east 17 ch. 94 links, to the Willamette river; thence with the meanders of said river, down stream, N. 16° 45′ east 31 ch. 23 links, to the place of beginning, which said land was patented to the said Nancy Lownsdale by the proper officers of the Government of the United States, to have and to hold unto the said Nancy Lownsdale, to her heirs and assigns.

That upon the death of the said Nancy Lownsdale her said heirs each became seized and entitled to an undivided one-fifth of the land so patented to her, including the south half of the tract commonly designated by the letter "G," and so designated for the purposes of this suit, containing about (1) one acre.

6 Complainants further show that the said Isabella Ellen Potter and William Potter, by deed, duly executed and delivered, sold and conveyed the interest of the said Isabella Ellen, in the estate of her

said mother Nancy Lownsdale, (and said deed was dated on or about the 17th day of January, 1860, to the said Daniel H. Lownsdale, deceased.

That by reason of the premises the said Daniel H. Lownsdale become seized in fee of an undivided two-fifths of the said tract of land so patented to the said Nancy Lownsdale, including the south half of the said block "G," and so continued to be such owner up to the time of his death, and thereupon the undivided two-fifths of the south half of block "G," as also of the remainder of said tract, descended to and became the property of the heirs aforesaid of the said Daniel H. Lownsdale.

Complainants further show to the court that the said heirs of Daniel H. Lownsdale being tenants in common with William Gillihan and the heirs of Nancy Lownsdale in the whole of said tract patented to Nancy Lownsdale, including block "G," the said William Gillihan brought his suit, for the *petition* of the Nancy Lownsdale tract, in the circuit
7 court of the State of Oregon, for the county of Multnomah, and in which suit said William Gillihan was plaintiff, and the parties to this suit and sundry other persons were defendants, among whom were W. W. Chapman and Stephen Coffin, and by the judgment and decree of said court duly rendered and given, it was, among other things, on the 22d day of May, 1865, adjudged and decreed that the said Daniel H. Lownsdale was the owner of an undivided two-fifths of the entire Nancy Lownsdale tract, including the said south half block "G," and that the said William Gillihan, Ruth A. Lownsdale, and Millard O. Lownsdale, as heirs of Nancy Lownsdale, deceased, were each entitled to an undivided one-fifth of the whole of said tract of land in fee, as will more fully appear by reference to said decree, a copy of which is marked Exhibit "B," and made a part hereof. That thereafter, on the 12th day of August, 1865, the said court in said suit by its decree duly rendered and given, decreed and set apart to the said William Gillihan, Ruth A. Lownsdale, and Millard O. Lownsdale, certain portions of said tract to be held by them in severalty, and also thereby set apart and allotted to the heirs, vendees, or claimants under D. H. Lownsdale, according to their respective interests, all of the said tract not allotted to the
8 said William, Millard O., and Ruth A., heirs of Nancy Lownsdale, deceased, and that by reason of the said partition not being equal, it was adjudged that the said William Gillihan, Millard O., and Ruth A. Lownsdale should have a lien upon said tracts so set apart to the heirs, vendees, and claimants under said Daniel H. Lownsdale to the amount of $39,156 02, and that said amount should be apportioned among the several parcels claimed by the defendants. That the sum of $876 25 was so adjudged a lien upon the south half of said block "G," as will more fully appear by reference to a copy of said last-mentioned decree hereto annexed, marked Exhibit "A," and made a part of this complaint.

That by reason of said decree in partition the said heirs of D. H. Lownsdale became the owners of and acquired by purchase the remaining three-fifths of the said block "G," and from that time, and ever since, have been, and now are, the owners in fee of the south half of said block "G," subject to the claim of Hiram and Hannah Smith, defendants, herein set forth as follows: Said Hiram and Hannah Smith, who are husband and wife, claim to have acquired about the year 1860, by purchase of Daniel H. Lownsdale, an undivided $\frac{2}{5}$ of the one-
9 fifth ($\frac{1}{5}$) of said block purchased from Isabella Ellen Potter, but complainants have no sufficient knowledge or information sufficient to form a belief whether or not the said Hiram and Hannah Smith own any part of said block.

Complainants further show that, except so much of said block as may

be owned by Hiram and Hannah Smith, the said south half thereof is now owned by said heirs of D. H. Lownsdale in the following proportions: James P. O. Lownsdale, Millard O., & Ruth A. Lownsdale, and Mary E. Cooper, each, own an undivided one-fifth thereof in fee, and Emma S. Lamb and Ida Squires, each, own an undivided one-tenth thereof in fee; that said heirs of D. H. Lownsdale are tenants in common, and in possession of the south-half of said block "G."

Complainants further show that their interest in said half block exceeds in value the sum of five hundred dollars, exclusive of the costs of this suit.

Complainants further show that the defendant, Davenport, claims some interest in the south half of said block "G," and to *derreign* title thereto through and by reason of the pretended execution of a deed of date June 25th, 1850, and by reason of pretended covenants said to be contained therein, whereby it is pretended that Daniel H. Lownsdale conveyed his interest in the premises in question to W. W. Chapman
10 and his assigns, and that complainants are estopped from asserting their title and right to the same.

Complainants would show, as they are informed and believe, that said D. H. Lownsdale did not make, execute, and deliver the said pretended deed to W. W. Chapman, and neither the said Chapman nor any one claiming to have right to said premises under said pretended deed ever at any time had received or took possession of said premises.

Complainants would further show that, at the date of said pretended deed, neither the said Lownsdale nor any one had any interest or estate in or to said half block, and the said Lownsdale has not at any time since obtained the fee simple to the said premises from the Government of the United States, but the said Government granted and patented the same to Nancy Lownsdale as aforesaid.

Complainants would further show that said Davenport pretends to have right and title to said south half of block "G" by reason of a pretended agreement between himself and said D. H. Lownsdale made on or about the 1st of June, 1860, and by reason of pretended representations then made by Lownsdale to the effect that his said Davenport's title to the premises in question was good; and it is pretended
11 that said Lownsdale in and by said agreement, and in consideration of $2,000 then paid to him, agreed to confirm said south half of block "G" to the said Davenport.

Complainants would show that said Daniel H. Lownsdale did not make any such pretended agreement and did not make any such pretended representations; but if any such agreement was made the same was without consideration and was not in writing and therefore fraudulent and void.

Therefore complainants pray that the interest as aforesaid may be set apart to them in severalty, and for such other and further relief as is meet and equitable and good conscience.

PAGE, & W. LAIR HILL,
*Solicitors for Complainants.*

DISTRICT OF OREGON:

I, William E. Cooper, being sworn, say, I am the agent and att'y in fact of the complainants, that they are not within the district, and the foregoing amended bill of complaint is true as I verily believe.

W. E. COOPER.

Subscribed & sworn to before me this 8th day of February, 1868.

R. WILCOX, *Clerk.*

12 *Exhibit "B," made a part of complaint.— W. W. Page.*

MONDAY MORNING, TEN O'CLOCK, *May 22d*, 1865.

Special term, sixth day.

Court met pursuant to adjournment, present the same officers as on the 12th day of May, 1865.

Journals of the proceedings of that day read and signed by the judge.

MARTIN GILLIHAN, GUARDIAN OF WILLIAM GILLIHAN,
*vs.*
S. N. ARRIGONI, H. W. CORBETT ET AL.

At this day comes the parties by their respective attorneys as heretofore, and the court having heard counsel upon the exceptions to the report of the referees heretofore appointed to appraise the property in dispute for the information of the court, overrules said exceptions, to which ruling of the court the defendant's *objections* except; and it appearing to the court from the pleadings and proofs and the report of the referees aforesaid that the land claim in controversy can not be partitioned equally between the heirs and representatives of Nancy Lownsdale, deceased, without prejudice to the rights and interests of those claiming under Daniel H. Lownsdale, and that Daniel H. Lownsdale in his
13 life time as heir of the said Nancy Lownsdale and as the vendee of Isabella Ellen Potter, another heir of said Nancy, was entitled to two-fifths of all the land in controversy, and the plaintiff William Gillihan to one-fifth and Ruth A. Lownsdale and Millard O. Lownsdale to one-fifth each as heirs of said Nancy. It is therefore ordered, adjudged and decreed by the court that the said tract of land described in the complaint as the land claim of said Nancy Lownsdale and heretofore appraised by the referees be partitioned and allotted to respective representatives of the said Nancy, in manner following, that is to say:

That the tract described as Park avenue, being a piece one hundred and fifty feet wide and extending across the entire claim, the parcel designated as the north half of block No. 253, being two hundred and eighty feet long and one hundred and thirty feet wide, and the whole of said land claim lying west of parcels designated "G" "H" & "J" be and the same are assigned to Ruth A., Millard O. Lownsdale & William Gillihan minor heirs of Nancy Lownsdale, and that said parcels be partitioned equally between said Ruth A. Lownsdale, Millard O. Lownsdale & William Gillihan and allotted to them in equal portions, qual-
14 ity and quantity relatively considered, one-third in value to be awarded to each, and that all the residue of said land claim be assigned to the representatives of Daniel H. Lownsdale, (claiming as heirs or vendees,) and it appearing that compensation is due from the representatives of Daniel H. Lownsdale to the minor children above named, on account of the irregularity of partition, and that some of the parcels designated on the maps, exhibited by numbers, have been subdivided, and are claimed by the respective defendants in severalty: It is further ordered that the amount of compensation justly due from all the claimants under Daniel H. Lownsdale be estimated and ascertained and such total amount be equally distributed and apportioned among the several lots and subdivisions as claimed by the defendants respectively. It is further ordered that H. C. Leonard, J. C. Ainsworth & George H. Belden, esq., the referees heretofore appointed in this cause, be and they are

appointed referees to make final partition and estimate of compensation under this decree, and the said referees after being sworn are directed to divide the property above assigned to said Ruth A., Millard O. Lownsdale & William Gillihan, equally between them, and to allot to
15 each his or her several portions thereof quantity and quality relatively considered, designating the several portions by proper landmarks, making or causing to be made all necessary surveys; and the said referees are directed to report their proceedings, specifying the manner of executing their trust and describing the property allotted to each party. It is further ordered that said referees estimate and determine the amount of compensation herein provided for and report in detail the amount that shall be justly charged upon all the property assigned to the representatives of Daniel H. Lownsdale and the amounts charg'able upon the several parcels occupied or claimed by the defendants, stating the ratio of such amount to the whole value of the parcel upon which it is charged, and that this estimate be made upon view, and upon the principles specified in the foregoing decree under which report has been filed; the former appraisment, however, not be binding if the referees see cause to change the same. The referees are further directed to decide all questions of value upon view and upon the pleadings and proofs filed in this cause, and report herein within thirty days if practicable.

The defendants, represented by W. W. Chapman, att'y, except to
16 this decree and to that part especially which confines the referees to a view and to the papers in this case, and excludes further testimony and a hearing of the parties before the referees. The other defendants except generally, and all have leave to file specifications.

(Signed) ERASMUS D. SHATTUCK, *Judge.*

STATE OF OREGON,
*County of Multnomah, ss:*

I, H. C. Coulson, clerk of the circuit court of the State of Oregon for said county, do hereby certify that the foregoing copy of decree has been by me compared with the original and that it is a correct copy of the whole of such original, as the same appears of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 11th day of Dec. A. D. 1867.

[CIRCUIT C. SEAL.] H. C. COULSON, *Clerk.*

17 *Exhibit "C," made part of complaint.*

This cause having been heard upon the exceptions to this report of the referees, heretofore filed, the respective parties appearing by their attorneys as heretofore, and the court having heard further proofs and the argument of counsel respecting the compensation justly due to the heirs of Nancy Lownsdale on account of irregularity of partition, and duly considered the matter, finds that said report should be in part set aside and modified that is to say: In this, the compensation allowed to the heirs aforesaid should be reduced ten per cent. upon the legal tender estimate reported, and instead of the sum of forty-three thousand five hundred and six $\frac{68}{100}$, as fixed by said referees, there should be only thirty-nine thousand one hundred and fifty-six & $\frac{02}{100}$ dollars in United States legal tender notes, which last-named sum is allowed for compensation as aforesaid, and a like deduction of ten per cent., as also ordered and made in the amounts apportioned to the respective lots and parcels of land claimed by the defendants, and said report (with the

amounts estimated in legal tender notes reduced) in this and in all other respects ought to be, and is hereby, confirmed. It is therefore or-
18 dered, adjudged and decreed that the partitions, made by said referees, be effectual, firm, and binding, and conclusive, except as in this decree provided; that is to say, that there be and is allotted and assigned to Millard O. Lownsdale as one of the heirs of Nancy Lownsdale all that part of Park avenue, south of the center of the extension of Yamhill street, and extending to the south line of the tract described in this complaint as Nancy Lownsdale Donation Claim, and between the center lines of East and West Park street, according to the plot filed with the pleadings. Also all the parcels of land described and designated on the said plat as blocks "K" and "L," and the north forty-five (45) feet of lot one (1) in block two hundred and fifty-three (253) to Ruth A. Lownsdale; that part of Park avenue north of the center line of Washington street, and between the centre line of East and West Park streets to the south line of Benjamin Stark's claim, and that part of Park Avenue lying between the center lines of Alder and Morrison streets, and the center lines of East and West Park streets; also all of those parcels of land described and designated on said plat as block S, and blocks No. one, (1) all of lots seven (7) and eight
19 (8) in block No. two hundred and fifty-three, (253,) and that part of the lot containing $2\frac{71}{100}$ acres lying south of the centre of Yamhill street extending and lying west of block No. one (1.)

To William Gillihan that part of Park avenue between the centre of Washington and Alder and the centres of East and West Park streets, and that part of Park avenue lying between the centers of Morrison and Yamhill streets, and centers of East and West Park streets; also all of block "T;" all of block No. (2) two, all of lot No. 2, and forty-five feet of south side of lot No. one (1) in block number two hundred and fifty-three, (253,) all that part of lot containing $2\frac{71}{100}$ acres north of the centre line of Yamhill street, and all north of parcel land No. two, (2.) To the heirs and vendees or claimants under Daniel H. Lownsdale, according to their respective interests, all of said tract not above-mentioned, and allotted to the said Millard O., Ruth A., and William, heirs of said Nancy. And it appearing that said partition is unequal, and that the said heirs of Nancy Lownsdale are entitled to compensation, which has been assessed as aforesaid, it is ordered, adjudged and decreed that the said Millard O., Ruth A., and William, do jointly have a lien
20 upon said tracts and parcels of land allotted to those claiming under said Daniel H. Lownsdale, as aforesaid, for the said amount of compensation to wit: The sum of thirty-nine thousand one hundred and fifty-six & $\frac{02}{100}$ dollars ($39,156 $\frac{02}{100}$) in United States legal-tender notes, and that said sum be, and it is, apportioned among the several parcels claimed by the defendants, and is charged upon the respective lots or parcels as follows, to wit:

| | |
|---|---|
| Block 209, lots 1 & 2, Attila, wife of Francis Dewitt, (fractional) one hundred and twenty-three & $\frac{23}{100}$ dollars.. | $123 23 |
| Block 209, lots 3 & 4, Walter Moffett (fractional) one hundred and nine & $\frac{54}{100}$ | 109 54 |
| " 209, lots 5 & 6, G. W. Walling, the sum of four hundred & fifty-eight $\frac{67}{100}$ dollars | 458 67 |
| " 209, lot 7, Samuel Scott, the sum of two hundred and fifteen $\frac{63}{100}$ dollars | 215 63 |
| " 209, lot 8, C. Hay & others, the sum of two hundred and forty-three $\frac{01}{100}$ | 243 01 |

| | | |
|---|---|---|
| " | 210, lots 1, 2, 7, & 8, H. W. Corbett, the sum of six hundred and two and $\frac{42}{100}$ dollars | 602 42 |
| " | 210, lots 3, 4, 5, &, 6, Addison C. Gibbs, the sum of six hundred & two $\frac{42}{100}$ dollars | 652 42 |
| " | 211, A. C. Gibbs & others, the sum of twelve hundred & four $\frac{85}{100}$ $ | 1,204 85 |
| " | 212, lots 1 & 8, M. P. Deady, the sum of three hundred & forty-nine $\frac{13}{100}$ | 349 13 |
| 21 | Block 212, lots 2 & 7, C. O. Clark, the sum of three hundred fifty-three $\frac{50}{100}$ dollars | 353 50 |
| " | 212, lots 3, 4, 5, & 6, J. S. & O. B. Risley, the sum of five hundred ninety-two $\frac{16}{100}$ dollars | 592 16 |
| " | 213, Tho's Scott, the sum of one thousand and ninety-five $\frac{31}{100}$ dollars | 1,095 31 |
| | 214, Geneve G. H. Brooke, wife of L. Brooke, the sum of twelve hundred and four $\frac{84}{100}$ dollars | 1,204 84 |
| " | 215, Henry L. Pittock, the sum of sixteen hundred and forty-two $\frac{98}{100}$ dollars | 1,642 98 |
| " | 216, Levi Estes & D. A. Stimson, the sum of sixteen hundred forty-two $\frac{98}{100}$ dollars | 1,642 98 |
| " | 217, Sylvester & Mary Ann Pennoyer, the sum of sixteen hundred forty-two $\frac{98}{100}$ dollars | 1,642 98 |
| " | 218, A. M. & L. M. Starr & others, the sum of fifteen hundred & thirty-three $\frac{45}{100}$ dollars | 1,533 43 |
| " | 219, James B. & Sarah E. Harker, the sum of sixteen hundred & forty-two $\frac{98}{100}$ dollars | 1,642 98 |
| " | 220, lots 1, 2, 7 & 8, A. B. & A. B. Glison, the sum of seven hundred & ninety-four $\frac{11}{100}$ dollars | 794 11 |
| " | 249, S. N. Arrigoni & wife, thirteen hundred & sixty-nine $\frac{15}{100}$ dollars | 1,369 15 |
| " | 250, Alexander & Christiana E. Hamilton, fourteen hundred & twenty-three $\frac{91}{100}$ | 1,423 91 |
| " | 220, lots 3, 4, 5 & 6, Francis M. & Elizabeth D. Warren, seven hundred & ninety-four $\frac{11}{100}$ | 794 11 |
| " | 251, W. A. Abbott, the sum of thirteen hundred & fourteen $\frac{39}{100}$ dollars | 1,314 39 |
| 22 | " 252, W. A. Abbott, the sum of fourteen hundred & twenty-three $\frac{96}{100}$ dollars | 1,423 92 |
| " | 253, lots 3, 4, 5 & 6, W. A. Abbott, the sum of seven hundred & eleven $\frac{96}{100}$ dollars | 711 96 |
| " | 254, John & Mary Hulery, the sum of two hundred & ten $\frac{28}{100}$ dollars | 210 28 |
| " | 254, lots 2, 3 & 4, Joseph & Isaac Bergman, the sum of five hundred and thirty-seven $\frac{79}{100}$ dollars | 537 79 |
| " | 254, lots 5 & 6, G. H. Triboo & others, the sum of three hundred & fifty-five $\frac{90}{100}$ dollars | 355 90 |
| " | 254, lots, 7 & 8, A. M. & L. M. Starr & others, the sum of three hundred & thirty-seven $\frac{90}{100}$ dollars | 337 90 |
| " | 255, Lansing Stout, the sum of twelve hundred & four $\frac{85}{100}$ dollars | 1,204 85 |
| " | 256, lots 1, 2, 3, Jacob Gogette, the sum of four hundred & seventy-five $\frac{37}{100}$ dollars | 475 37 |
| " | 256, Vincent Rand, the sum of one hundred & eighty-six $\frac{19}{100}$ dollars | 186 19 |
| | 256, P. B. Risley & E. W. Fine, one hundred & sixty-eight $\frac{2}{100}$ dollars | 168 12 |

| | | |
|---|---|---|
| " | 256, lots 6, 7, 8, George Taylor, the sum of four hundred & twenty-nine $\frac{91}{100}$ dollars | 429 91 |
| " | 257, lots 1, 2, 7 & 8, A. E. Wait & J. K. Kelly, the sum of six hundred & twenty-nine $\frac{81}{100}$ dollars | 629 81 |
| " | 257, lots 3, 4, 5, 6, S. Norris, the sum of six hundred twenty-nine $\frac{81}{100}$ dollars | 629 81 |
| " | 258, Isaac B. Smith, the sum of twelve hundred fifty-nine $\frac{61}{100}$ dollars | 1,259 61 |
| 23 " | 259, Charles & Mary Warren & others, the sum of three hundred & eighty-three $\frac{40}{100}$ | 383 40 |
| " | 259, lot 3, Charles & Mary Warren & others, the sum one hundred & sixty-four $\frac{24}{100}$ | 164 24 |
| " | 259, lot 4, Charles & Mary Warren & others, the sum of one hundred and sixty-four $\frac{29}{100}$ dollars | 164 29 |
| " | 259, lot 5, 6, 7, & 8, Charles & Mary Warren & others, the sum five hundred & forty-seven $\frac{63}{100}$ dollars | 547 63 |
| " | 260, W'm Cree, adm'r es't of Robert Thompson, dec'd, one thousand & ninety-five $\frac{31}{100}$ dollars | 1,095 31 |
| " | G, south half, Isaac A. Davenport, fractional, eight hundred & seventy-six & $\frac{25}{100}$ dollars | 876 25 |
| " | G, north half, James Fields, in the sum of nine hundred & eighty-five $\frac{79}{100}$ dollars | 985 79 |
| " | H, Stephen Coffin, adm'r Elijah Hill, one thousand nine hundred & seventy-one $\frac{58}{100}$ dollars | 1,971 58 |
| " | I, Hiram and Hannah M. Smith, one thousand nine hundred & seventy-one $\frac{58}{100}$ dollars | 1,971 58 |
| " | J, Hiram & Hannah M. Smith, the sum of fourteen hundred and seventy-eight $\frac{67}{100}$ dollars | 1,478 67 |
| | Total, thirty-nine thousand one hundred and fifty-six & $\frac{02}{100}$ dollars | 39,156 02 |

That the said sums be a lien upon the said parcels respectively, and if not paid by the party in possession or claiming the property within ninety days. that execution issue requiring the sheriff to sell so much of any parcel upon which said sum is charged as aforesaid as 24 may be necessary to pay said amount and accruing costs. And it appearing that there are conflicting claims between the heirs and purchasers of D. H. Lownsdale to portions of the tract allotted to said heirs and purchasers according to their respective interests, and that it is not practicable to make up and determine the issues between said parties in this suit, it is ordered, adjudged, and decreed, that nothing herein or hereby done shall prejudice any lawful claim of any of the defendants, being heirs of, or claimants under, Daniel H. Lownsdale, as between themselves; nor shall this decree be any bar to any other action, suit, or proceeding between any of the defendants in this suit to settle and determine any conflicting claims; and in case any of the defendants being in possession under a conveyance from Daniel H. Lownsdale or *and* claiming any parcel as heir or vendee of said Lownsdale, shall pay the amount of compensation hereby charged upon such parcel and afterwards be evicted from such parcel or any portion or share thereof by any other defendant claiming under said Lownsdale, he shall be entitled to claim and have a lien upon such land for the reimburs'ment of said money and interest or such part of it as the portion *e*from which 25 he is evicted is to the whole parcel. It is further ordered and decreed that the costs and disbursements, including the fees of

referees to be paid by the parties to this suit in proportion to their respective interests, and that the same be apportioned pro rata among the claimants according to the values fixed to their parcels by the report aforesaid, and that the same be paid or collected in like manner as the compensation above stated. It is further ordered that the compensation be paid one-third ($\frac{1}{3}$) to Martin Gillihan and one-third ($\frac{1}{3}$) to John A. Blanchard, general guardian of Ruth A. Lownsdale, and one-third ($\frac{1}{3}$) to J. P. O. Lownsdale, general guardian of Millard O. Lownsdale, for the benefit of their respective wards upon their filing each an additional bond in the sum of ten thousand dollars, conditioned as the law requires, with two or more sureties.

To the foregoing order and decree the defendants, by their respective attorneys, excepted.

ERASMUS D. SHATTUCK, *Judge.*

(Endorsed:) "Filed February 8, 1868. R. Wilcox, clerk."

26 And afterwards, to wit, the following demurrer was filed February 15th, 1868, with the clerk of this court:

In the circuit court of the United States for the district of Oregon.

JOHN R. LAMB AND EMMA S. LAMB, AND IDA Squires, complainants,
*vs.*
ISAAC A. DAVENPORT & JAMES P. O. LOWNSdale & others, defendants. } In equity.

And now comes the said defendant, I. A. Davenport, by W. W. Chapman, his solicitor, and demurs to the complainant's bill, as follows:

1. It nowhere appears in and by complainant's bill that Daniel H. Lownsdale inherited any part of the estate of Nancy Lownsdale, deceased.

2. It does not appear by complainant's bill that, by reason of said Daniel inheriting $\frac{1}{5}$ and purchasing the interest of Isabella Ellen, that the said Daniel became seized of an undivided $\frac{2}{5}$ of said tract, including block G, and so continued to his death.

27 3. It does not appear, as alleged in complainant's bill, that, by reason of said Daniel inheriting $\frac{1}{5}$ and purchasing another $\frac{1}{5}$ he continued owner of $\frac{2}{5}$ until his death; nor does it appear that by reason thereof $\frac{2}{5}$ of said estate de'cended to, and become the property of his heirs.

4. It does not appear, on reference to Exhibit B, filed with complainant's bill, that the title to $\frac{2}{5}$ of the said tract, including block G, was in the said Daniel H. Lownsdale at the time of his death as against this defendant, or was by said decree so adjudged.

5. It does not appear by the statements in complainant's bill that the heirs of Daniel H. Lownsdale, by reason of the decree aforesaid become the owners by purchase of $\frac{3}{5}$ of block G, or that they have been or are now the owners in fee of the south half of said block G, subject to the claim of Hiram & Hannah Smith, or otherwise.

6. The said bill is multifarious, in including a controversy between Hiram Hannah Smith with this defendant, and different causes of action in the same.

28 7. The prayer of the bill is not sufficient and applicable to the statements in the bill.

8. That all that part of complainant's bill wherein he sets up defendant's pretended title and attempts to avoid the same, are uncertain and insufficiently stated.

9. The matters set out by complainant in his bill respecting defendant's pretended agreement with D. H. Lownsdale and the matters he sets up in avoidance, as well as his plea of the statute of frauds, are indefinite, uncertain, and insufficiently set forth; and the matters stated in avoidance are insufficient and no matters in avoidance of defendant's alleged defense.

10. The complainant's bill is uncertain, indefinite, and contains no ground for equitable relief.

11. The complainant's bill is argumentative.

Wherefore defendant prays judg't.

W. W. CHAPMAN,
*Pl'ff's Solict'r.*

(Endorsed:) "Filed February 15, 1868. R. Wilcox, clerk."

29 And afterwards, to wit, on February 21st, A. D. 1868, being the 26 judicial day of the January term of the circuit court for the district of Oregon, Hon. M. P. Deady, judge, among other the following proceedings were had, that is to say:

JOHN R. LAMB ET AL. *vs.* I. A. DAVENPORT ET AL. } In equity.

Now, at this day, come the parties to the above-entitled cause, by their respective solicitors, as heretofore, and the court having heard the argument of counsel upon the demurrer to the bill herein, it is considered that the said demurrer be overruled at the cost of the defendant; and thereupon the defendant had until the first Monday in April next to file an answer herein.

(S'd) MATHEW P. DEADY,
*Judge District Court.*

And afterwards, to wit, April 6th, 1868, the following answer was filed with the clerk of this court aforesaid:

In the circuit court of the United States for the district of Oregon.

30 JOHN R. LAMB, EMMA S. LAMB, AND Ida Squires, complainants, *vs.* ISAAC A. DAVENPORT, JAMES P. O. LOWNSdale, Millard O. Lownsdale, by his guardian James P. O. Lownsdale, Ruth A. Lownsdale, by John Blanchard, her guardian, Mary E. Cooper, Hiram & Hannah Smith, defendants. } In equity.

Page 1.—1 To the Hon. the judges of said
2 court.
3 The seperate answer of
4 the defendants I. A. Davenport to
5 a bill in said court exhibited
6 by the above-named complainants

against the above-named defendants.
This defendant saving and
reserving to himself the benefit of
all exceptions to the manifold
errors and insufficiency in
said bill contained for answer
Page 2.—thereunto, or unto so much
thereof as he is advised is
material for him to answer
unto, answers and says
that, as he is informed and believes,
and so charges, the said Daniel
31 H. Lownsdale was not lawfully
married to the said Nancy
until some time in the year
1857. This defendant denies that
the said Nancy died leaving the
said Daniel as one of her
heirs-at-law, and denies that
the said Nancy died seized in
fee in and to the tract of land
in complainants' bill mentioned.
Respondent denies that,
upon the death of the said
Nancy Lownsdale, her alleged
heirs each became seized &
entitled to an undivided one-
fifth of the said tract of land,
including the south half of the
tract commonly designated
by the letter (G.) As to whether
the said Isabella Ellen and
William Potter, on the 17th day of
January, 1860, or at any other
Page 3.—time,
by deed of date 17th
January, 1860, or at any other time
by deed conveyed the interest of
the said Isabella Ellen in the estate
of her mother to said Daniel, this defendant
has no sufficient knowledge
32 and information to enable
him to form a belief.
This defendant denies that by
reason of the matters and things
as set out in complainants' bill, that
the said Daniel become seized
in fee of an undivided two-
fifths of the said tract of land,
including the said south half of
block (G,) or that he so continued
to be such owner up to the time
of his death; and denies that, upon
the death of said Daniel, two-fifths
of said tract and south half
of said block, de'cended to and

become the property of the heirs
aforesaid of the said Daniel.
This respondent denies that, by
reason of anything in the decree
in complainants' bill referred to,
the heirs of Daniel H. Lownsdale
Page 4.—become the owners of, or acquired by
purchase, the three-fifths interest in
the south half of block (G,) but that
all the interest which they did
acquire indeed by said decree
to said half block was acquired
by inheritance, subject to the
33 rights of the vendees and claimants
under said Daniel H. Lownsdale.
This defendant, answering as
to the alleged claim of the said
Hiram and Hannah Smith, says
that, as he is informed and believes,
the said Daniel, in the year 1860,
executed to the said Hiram & Hannah
Smith a deed for one-fifth of the
said Nancy Lownsdale tract, as purchaser of Isabella Ellen, and
not as set out in complainants'
bill. Respondent denies that
any part of said south half of
said block is now owned by the
said heirs of D. H. Lownsdale,
or that the complainants have
any interest therein, and denies
that said heirs of D. H. Lownsdale
are tenants in common of said
south half of said block,
or in possession thereof.
Page 5.—To that part of complainants'
bill setting out this defendant's
alleged pretended claim to said
half block, defendant says that
on the 13th day of December, 1849, the
said Stephen Coffin and Daniel
H. Lownsdale, by an instrument
34 in writing, under seal, for a
valuable consideration, granted,
bargained, and sold to the
said W. W. Chapman, and delivered to him the possession one undivided
one-third of the said tract of
land known and designated
in the complainants' bill as the
Nancy Lownsdale tract; and the
said parties covenanted to and with each
other, jointly, to own an undivided
one-third of said tract; and they
covenanted each with the other
to obtain the title of the United

States for their mutual benefit
and for the benefit of those to
whom they might sell any
portion of the same; that the
said Lownsdale, Coffin, & Chapman
la*yed* the said tract off into blocks,
designating them by figures & letters,
amongst others the one letter (G;)
Page 6.—that the last-mentioned parties,
on the 25th of June, 1850, for a
valuable consideration by deed,
assumed and represented themselves
to be proprietors of said town, now
the city of Portland, and released,
confirmed, and quitclaimed
unto the said Chapman to have
35 and to hold to him, his heirs,
and assigns, forever, the said block
(G,) and then and there delivered
the said deed and the possession
of said block to the said Chapman.
That the grantors in and by said
deed covenanted to and with
the grantee that the property
aforesaid unto him, his heirs,
and assigns they would warrant
and defend against all claims,
the United States excepted; and
if they should obtain the
fee-simple to said property, they
would convey the same to the
said grantee by deed of general
warranty; and the defendant
deraigns title to the said half block,
through and by reason of the
execution of the said instrument
Page 7.—of writing and covenants
therein contained, as also as
herein mentioned;
and, in answer to that part of
complainants' bill, wherein
they allege that, at the date
of the alleged or pretended
deed, neither the said Lownsdale,
nor any one had any interest
36 or estate in or to said half
block; and that the said
Lownsdale has not at any
time since obtained the fee-simple
to the said premises from the
Government of the United States,
but that the said Government
granted and patented the
same to Nancy Lownsdale, as
aforesaid, this defendant says:
That the said Daniel H. Lownsdale,

being an unmarried man,
21 years of age, a white male
citizen of the United States, on
the 22 day of September, 1848,
settled upon, and from that
time continuously for four years
resided upon and occupied,
a tract of 320 acres of land,
Page 8.—including the said block, and was in the
possession thereof at the date of
said instruments of writing,
and did obtain the fee-simple
from the United States to two-fifths
of said tract of land, and did
obtain the fee-simple to the said
half block from the United
States.
37 To that part of complainants'
bill in which they allege that
the said tract of land, embracing
the said half block, was
patented by the United States
to the said Nancy Lownsdale,
respondent says he has not
sufficient knowledge or in-
formation to enable him to
form a belief whether or not
the said tract of land was
patented to the said Nancy
Lownsdale, & therefore denies
the same; but that if any
patent of said tract issued to
the said Nancy, or the heirs-at-
law of the said Nancy, it was
professedly under the act of Congress of the
27th September, 1850, called the
Page 9.—donation law, and
professedly in virtue of the settlement
and cultivation by
the said Daniel hereinbefore
mentioned, and their intermarriage, and, as
respondent is informed
and believes, after the
death of the said Nancy.
And respondent, further
answering the allegations
38 in complainants' bill
that the patent to said
tract of land issued to
the said Nancy Lownsdale,
shews to the court that if
the said patent did issue
to said Nancy, as alleged,
that it was by the procure-
ment of the said Daniel,
contrary to the said covenants

and undertakings; and
that he did, of his own will
and purpose, obtain the
title of the United States to a
part of said premises indirectly,
and that if there is any
part of said premises which
he did not obtain directly
Page 10.—from the United States, as
contemplated in and by
the second of his covenants
in the said deed of the
25th of June, 1850, that it
was procured and resulted
from the act of the said
Daniel in not continuing
his possession, occupancy, &
qualifications, as the same
39 existed at the date of the
said covenants, and in
violation of the true intent
and meaning thereof, and
that complainant, as the heirs-
at-law of the said Daniel, are
estopped to deny that the alleged
after-acquired title is the title
of the United States, or that any
title which he may at any
time have acquired to the
premises was for the use &
benefit of respondent, or
that it was the claim against
which the said Daniel by his
said covenant was bound
to defend.
And respondent, further
Page 11.—answering as to the alleged
decree, shews to the court
that by virtue of the said
covenants and undertakings,
and of the several convey-
ances made, and through
which respondent deraigns
title, and by virtue of
the alleged decree and
the payment of the sum
of $876 25, the amount assessed
40 thereon as owelty; that he
became entitled to and
is the owner of the entire
south half of block (G,)
and denies that complainants
are justly and lawfully
entitled to any part thereof;
and respondent, for
answer to that part of the

21 complainants' bill wherein
22 they pretend to set up
23 respondent's claim under
24 a certain contract of June,
25 1860, says that his claim
26 in this respect is as follows,
27 and not otherwise; that is
28 to say, that on or about
Page 12.—1 the first day of June, 1860,
2 respondent, having lots in
3 the city of Portland, the
4 title to which had become
5 subject to some doubts,
6 amongst which was the
7 said half block, and which
8 respondent had conveyed
9 by deed, with warranty, to
10 Hendee; and the said
11 Daniel, being anxious to
41 12 dispose of half of block No. 75
13 in said city, it was agreed
14 by and between the said
15 Daniel and respondent, that
16 for the consideration of $2,000,
17 to be paid him by respondent,
18 he, the said Daniel, would
19 convey to him the said half block
20 No. 75, and execute to respondent
21 a confirmatory deed to all of
22 certain designated property, (amongst
23 which was the said half of block)
24 (G.,) the title to which should
25 appear to be defective, and
26 to which the said Daniel
27 could or did set up any
28 claim. That thereupon
Page 13.—1 respondent paid to said Daniel
2 the said sum of $2,000, and
3 he executed and delivered to
4 respondent a deed for said
5 half of block No. 75, and also
6 for some other property, but
7 did not execute a deed for
8 said half of block (G,) on the
9 ground, as he said, that he
10 had no claim to it, and
11 should set up none. That
12 upon the faith of said contract
42 13 the payment of said sum of
14 money, and the assurance of
15 the said Daniel that he made
16 no claim to said property, with
17 other reasons, respondent,
18 about the day of 1860, re-
19 purchased said property of
20 said Hendee; and respondent

is now lawfully and justly
entitled to the same; and
to have his title thereto established
as against the complainants.
Respondent for a further
answer, says that the said
William Gillihan, deceased, in
the complainants' bill,
Page 14.—1 mentioned some time in
the year 1847, and during
his marriage with the said
Nancy, had taken up and
settled upon 640 acres of the
public lands of the United States,
and from thence had personally
resided upon and cultivated
the same until some time in
the early part of the year 1850,
when he died, having, as a married
man, done and performed
43 all and singular the things
contemplated and required by
the said donation law, so as
to entitle him and his said
wife to the benefits thereby conferred.
That by the said act of the 27th
September, 1850, the said land vested
in the said Nancy and the heirs-at-
law of the said William Gillihan,
without condition or qualification,
whereby, and by force of the said
act, the said Nancy was disqualified
to hold any part of the donation
claim of the said Daniel; and the
title to the said Portland tract vested
solely in the said Daniel, subject to
Page 15—1 his contracts & conveyances, and
that if a patent for said land issued
to the said Nancy, it was unlawful
and fraudulent.
Respondent says that he denies that
his said contract and agreement
with the said Daniel, of June, 1860,
was fraudulent & void, & alleges that
the same was who'ly executed on
his part, and partially fulfil'ed
on the part of the said Daniel;
and that it was for a full
and valuable consideration.
44 Wherefore respondent alleges
that he is advised and
believes the complainants are not
justly or lawfully entitled to any
interest in the premises; and
that respondent is the legal and
equitable owner thereof, and

21 prays that his rights herein may
22 be decreed and established.

W. W. CHAPMAN,
*Resp't Att'y.*

United States circuit court, district of Oregon.

I, W. W. Chapman, attorney for I. A. Davenport, do say that the statements in the foregoing answer are true, as I verily believe; that defendant is not in the State, is the reason I make this affidavit.

W. W. CHAPMAN.

Subscribed and sworn to before me this 6th day of April, A. D. 1868.

R. WILCOX, *Clerk.*

(Endorsed:) "Filed April 6, 1868. R. Wilcox, clerk."

45 And afterwards, to wit, May 4th, 1868, the following bill of exceptions was filed in the office of the clerk of this court:

In the district court of the United States for the district of Oregon.

JOHN R. LAMB, EMMA S. LAMB, AND IDA Squires, complainants,
*vs.*
ISAAC A. DAVENPORT, JAMES P. O. LOWNSDALE, Willard O. Lownsdale, by his guardian, James P. O. Lownsdale, Ruth A. Lownsdale, by John Blanchard, her guardian, Mary E. Cooper, Hiram & Hannah Smith, def'ts.

And now comes the complainants, by Page & Hill, their solicitors, and except to the following specified parts of the seperate answer of Isaac A. Davenport, herein filed, for the reason that all the several parts so specified are impertenent, that is to say:

First. Commencing with the 5th line of the 2d page, and extending to the figures "1851" in the 10th line of the 2d page of said answer.

Second. Commencing with the 10th line of the 4th page of said answer, and extending to and including the word "bill" in the 19th line of
46 the 4th page.

Third. Commencing with the 1st line of the 5th page of said answer, and extending to the 1st line of page 6, of said answer.

Fourth. Commencing with the 1st line of the 6th page of said answer, and extending to the 4th line of the 7th page thereof.

Fifth. Commencing with the 4th line of the 7th page of said answer, and extending to the 10th line of the 8th page thereof.

Sixth. Commencing with the 9th line of the 9th page, and extending to the 28th line of the 10th page thereof.

Seventh. Commencing with the 28th line of the 10th page of said answer, and extending to the 19th line of the 11th page thereof.

Eighth. Commencing with the 19th line of the 11th page of said answer, and extending to and including the word "none" in the 11th line of the 13th page thereof.

47 Ninth. Commencing with the word "that," in the 11th line of the 13th page of said answer, and extending to the 25th line of the 13th page thereof.

Tenth. Commencing with the 25th line of the 13th page of said answer, and extending to the 4th line of the 15th page thereof.

Eleventh. Commencing with the 5th line of the 15th page of said answer, and extending to the 14th line of the 15th page thereof.

W. W. PAGE, &
W. LAIR HILL,
*Solicitors for Compl'ts.*

(Endorsed:) "Filed May 4th, 1868. R. Wilcox, clerk."

48 And afterwards, to wit, June 16th, A. D. 1868, the following order of hearing was entered of record:

In the circuit court of the United States for the district of Oregon.

JOHN R. LAMB ET AL. *vs.* I. A. DAVENPORT ET AL. } In equity.

Now, at this day, comes W. W. Page, esq., of counsel for the complainants, and W. W. Chapman, esq., of counsel for the defendants, and, by consent, the hearing upon the exceptions to the answer herein filed is set down for Monday, the 29th day of June, A. D. 1868.

MATHEW P. DEADY. *Judge.*

49 And afterwards, to wit, on Monday, June 29th, A. D. 1868, being the 9th judicial day of the May term of the U. S. circuit court for the year, 1868—present, Hon. M. P. Deady, judge—among other the following proceedings were had, that is to say:

JOHN R. LAMB ET AL. *vs.* I. A. DAVENPORT ET AL. } In equity.

Now, at this day, in this cause, it is ordered that the same be continued until Monday, the thirteenth day of July next ensuing.

(S'd) MATHEW P. DEADY, *Judge.*

And afterwards, to wit, on Tuesday, July 21st, A. D. 1868, being the 12th judicial day of aforesaid term of court—present, Hon. M. P. Deady, judge—among other the following proceedings were had, that is to say:

JOHN R. LAMB ET AL. *vs.* I. A. DAVENPORT ET AL. } In equity.

Now, at this day, comes the complainants, by W. W. Page and W. Lair Hill, esq'r's, their solicitors, and the said defendant, Davenport, by W. W. Chapman and D. Logan, esquires, his solicitors; and the
50 court having heard the argument of counsel on exceptions to the answer of the defendant, I. A. Davenport, will advise thereof.

(S'd) MATHEW P. DEADY, *Judge.*

And afterwards, to wit, at a regular term of the circuit court of the United States for the district of Oregon, began and held at Portland,

on Monday, the 7th day of September, A. D. 1868—present, Hon. M. P. Deady, judge—and on Wednesday, September 9th, 1868, being the 2nd judicial day of aforesaid term; among other the following proceedings were had, that is to say:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL.

Now, at this day, comes the complainants in the above entitled cause, by W. W. Page and W. Lair Hill, esquires, their solicitors, and the defendent, I. A Davenport, by W. W. Chapman, esq., his solicitor; and the court being sufficiently advised in the premises, it is considered that the first, second, fifth, seventh, and tenth exceptions to the answer herein be allowed, and that the third, fourth, sixth and eighth,
51 ninth and eleventh exceptions be not allowed. And further that the said complainants, have five days within which to file replication to the answer herein.

(S'd) MATHEW P. DEADY, *Judge.*

And afterwards, to wit, September 10th, A. D. 1868, the following general replication was filed in the office of the clerk of this court:

In the circuit court of the United States for the district of Oregon.

JOHN R. LAMB AND EMMA S. LAMB AND IDA Squires, complainants,
*vs.*
ISAAC A. DAVENPORT ET AL., DEFENDANTS.
} General replication.

The replication of the complainants above named to the seperate answer of Isaac A. Davenport, one of the defendants.

The replicants, saving and excepting and reserving to themselves all and every manner of advantage of exception to the manifold insufficienc'es of said answer for replication thereunto, saith that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said
52 defendant is uncertain, untrue, and insufficient to be replied unto by these replicants; without this that any other matter or thing whatsoever, in said answer contained, material or effectual, in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and these replicants are and will be ready to aver and prove, as this honorable court shall direct; and humbly prays as in and in by their said bill they have already prayed.

Dated at Portland this 10th day of September, A. D. 1868.

W. W. PAGE &
W. LAIR HILL,
*Solicitors for Complainants.*

(Original endorsed:) "Filed September 10th, 1868. R. Wilcox, clerk."

53 And afterwards, to wit, at a regular term of the circuit court of the United States for the dist. of Oregon, began and held at the city of Portland, on Monday, the 4th day of January, A. D. 1869—present, Hon. M. P. Deady, judge—and on Tuesday, January twelfth,

A. D. 1869, being the 3rd judicial day of said regular term, among other the following proceedings were had, that is to say:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

Now, at this day, come the complainants in the above entitled cause, by Mr. W. W. Page, their solicitor, and the defendant, I. A. Davenport, by Mr. W. W. Chapman, his solicitor, and, by agreement of the parties, it is ordered that this cause be set for trial on Monday, the 18th instant.

(S'd) MATHEW P. DEADY, *Judge.*

And afterwards, to wit, on Monday, January, 18th, A. D. 1869, being the 4th judicial day of aforesaid regular term—present, Hon. M. P. Deady, judge—among other, the following proceedings were had, that is to say:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

54 Now, at this day, in this cause, it is ordered that the hearing be continued until Monday, the twenty-fifth instant, whereupon, proclamation being made, court adjourned until ten o'clock a. m. of Monday, the twenty-fifth instant.

(S'd) M. P. DEADY, *Judge.*

And afterwards, to wit, on Monday, January 25th, A. D. 1869, being the 5th judicial day of aforesaid regular term of court—present, Hon. M. P. Deady, judge—among other, the following proceedings were had, that is to say:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

Now, at this day, come the complainants in the above entitled cause, by Messrs. Hill and Page, their solicitors, and the said defendant, I. A. Davenport, by W. W. Chapman, his solicitor; and the court having heard testimony on the part of complainants, this cause is continued until to-morrow.

(S'd) MATHEW P. DEADY, *Judge.*

55 And afterwards, to wit, on Tuesday, January 26th, A. D. 1869, being the 6th judicial day of aforesaid term of court, present Hon. M. P. Deady, judge, among othe' the following proceedings were had, that is to say:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

Now, at this day, come the parties to the above-entitled cause, as on yesterday, and the court having heard the testimony of the parties and

argument of counsel for complainants, this cause is continued until to-morrow.

(S'd) MATHEW P. DEADY, *Judge.*

And afterwards, to wit, on Wednesday, January 27th, A. D. 1869, being the 7th judicial day of aforesaid regular term of court—present the Hon. M. P. Deady, judge—and among other, the following proceedings were had, that is to say:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

Now, at this day, come the parties to the above-entitled cause,
56 as on yesterday, and the court having heard the argument of counsel upon the bill, answer, and replication herein, and the testimony of the parties, will advise thereof.

(S'd) MATHEW P. DEADY, *Judge.*

And afterwards, to wit, May 3rd, A. D. 1869, the following decree was entered of record:

In the circuit court of the United States for the district of Oregon, May term, 1869. May 3rd, 1869. Before the Honorable Mathew P. Deady, judge of the district court of the United States for the district aforesaid.

JOHN R. LAMB & EMMA S., HIS WIFE, AND Ida Squires, complainants,
*vs.*
ISAAC A. DAVENPORT, JAMES P. O. LOWNSdale, Millard O. Lownsdale, Ruth A. Lownsdale, Mary E. Cooper, and Hiram Smith, and Hannah M., his wife. } In equity.

This cause came on to be heard at the January term, 1869, of this court, upon the bill of the complainants, the answer of the defendant, Isaac A. Davenport, and the replication thereto, and the proofs
57 and exhibits, and was argued by Mr. W. W. Page and Mr. W. Lair Hill, of counsel for the complainants, and Mr. W. W. Chapman, of counsel for the defendant, Isaac A. Davenport, and thereupon the cause was continued until the present term for deliberation and advisement; and now on this day it appearing to the court that Daniel H. Lownsdale, in his lifetime, became the owner in fee of two undivided fifths of the west half of the donation land claim, known as the Lownsdale donation claim, including the south half of block "G" in the city of Portland, as described in the complainants' bill, one-fifth by donation from the United States upon the death of Nancy Lownsdale, his wife, before the issue of a patent thereto as her survivor and husband, and the other fifth by purchase from Isabella Ellen Potter, one of the children and successors in interest of said Nancy, and her husband, William Potter; and it further appearing to the court that on June 25th 1850, said Daniel H. Lownsdale was in the joint possession of said donation claim with W. W. Chapman and Stephen Coffin, and that said Coffin, Chapman, and Lownsdale being so possessed, then executed a deed to said W. W. Chapman for said south half of block "G," and

each therein covenanted with said Chapman that in case they or
58 either of them should afterwards acquire the title of said lands from the United States, they or either of them, as the case might be, would convey the same to said Chapman by a deed of general warranty; and the said defendant, Davenport, by conveyance from said W. W. Chapman and his grantees, has become the successor in interest of said Chapman, and that the title to the one-fifth of said south half of block "G," which the said D. H. Lownsdale acquired from the United States, enured to the said Davenport by virtue of said covenant to convey the title acquired from the United States; and that upon the death of said D. H. Lownsdale, on May 4th, 1862, without will, such two-fifths of the west half of the said Lownsdale donation claim, including the said south half of block "G," descended to the surviving children of said D. H. Lownsdale, namely, Mary E. Cooper, James P. O. Lownsdale, Millard O. Lownsdale, and Ruth A. Lownsdale, defendants herein, and to the representatives of Sarah Squires, the daughter of said Daniel H., before that time deceased, namely, Emma S. Lamb and Ida Squires, in equal parts, less certain undivided portions thereof, before that time sold and conveyed by said Daniel H. to third persons;
59 and that upon the death of said Daniel H., as aforesaid, and the aforesaid descent, the said south half of block "G" was owned in common, as follows: one-fifth by said Davenport, one-fifth by the children of said Daniel H. and their representatives above mentioned, and the other three-fifths by William Gillihan, jr., Millard O. Lownsdale, and Ruth A. Lownsdale, children of and successors in interest to said Nancy; and that said children of Nancy, as her successors in interest, were also the legal owners of three undivided fifths of the whole of the west half of the Lownsdale donation claim; and that the circuit court for the county of Multnomah, State of Oregon, at the suit of William Gillihan, jr., aforesaid, on August 12, 1865, by its decree duly given and entered, made partition of said west half between the children of Nancy aforesaid and the heirs and grantees of said Daniel H., including said south half of block "G;" and that by said decree certain specified parts of said west half were set apart to said William Gillihan, jr., Millard O. and Ruth W. Lownsdale, in severalty, and the remaining portion of said west half, including said south half of said block "G," to the heirs and vendees of said Daniel H., accord-
60 ing to their respective interests in common; and that by reason of such partition being unequal in quantity and value as between the children of Nancy aforesaid and the heirs and vendees aforesaid of Daniel H., said circuit court by said decree further provided that said children of Nancy should have a lien upon all that portion of the west half set apart to the heirs and vendees of Daniel H. as aforesaid, for the sum in the aggregate of $39,156 02, the same being the compensation decreed by said court to said children of Nancy, on account of the irregularity of said partition as aforesaid, of which aggregate sum $876 25 was apportioned to the south half of block "G" aforesaid, and made a lien thereon, with the privilege to any person claiming an interest therein, under said Daniel H. to pay the amount assessed thereon, and thereafter such person to have a lien thereon as security for being reimbursed such sum if he should afterwards be evicted therefrom or from any portion thereof, and that said sum should draw interest at the rate of ten per centum per annum from November 12, 1865; and that the defendant, Davenport, before the commencement of this suit had paid to the children of Nancy aforesaid
61 the owelty assessed upon said south half of block "G," to wit,

the said sum of $876 25, and the interest thereon, and that at the commencement of this suit the complainants were in possession of said south half of block "G" as tenants in common with said defendant, Davenport, and the remaining heirs of Daniel H., aforesaid; and that the defendants therein and Hannah M. Smith, or either of them, have no interest or estate in, or claim to, said south half of block "G," or any part thereof.

Therefore, the premises being first duly considered, it is adjudged and decreed that the defendants, Hiram Smith and Hannah M., his wife, or either of them, have no estate or interest in, or claim to, said south half of block "G," in law or equity, and that at the commencement of this suit, and ever since, the defendants, Davenport, Mary E. Cooper, James P. O. Lownsdale, Millard O. Lownsdale, Ruth A. Lownsdale, and the complainants, Emma S. Lamb and Ida Squires, were the legal owners, and seized in fee of the legal estate and interest in fee simple of said south half of block "G" as tenants in common; and that said Davenport was the legal owner, and so seized of an undivided five twenty-fifths of said south half of block "G," and that said Mary E. Cooper, James P. O. Lownsdale, Millard O. Lownsdale, and
62 Ruth A. Lownsdale, were each the legal owners, and so seized of four undivided twenty-fifths of said south half of block "G;" and that said Emma S. Lamb and Ida Squires were each the legal owners, and so seized of two undivided twenty-fifths of said south half of block "G;" and it is further ordered and decreed that James W. Cook, John Catlin, and Absalom B. Hallock be, and they are hereby, appointed commissioners to partition said south half of block "G" according to the respective interests of the owners thereof as herein ascertained and determined, upon a view of the premises, quality and quantity relatively considered, and report their doings in this behalf with all convenient speed to this court, for confirmation or other action, as to said court may appear right and just; and the said commissioners are also required to report whether or not it would promote the interest of such tenants to sell the said premises and partition the proceeds among them; and also to make such partition of said premises as to allow one-fifth thereof to the defendant, Davenport, and the other four-fifths to the other tenants in common, quality and quantity relatively considered.

(S'd) DEADY, *J.*

63 And afterwards, to wit, on August 11th, A. D. 1869, the following report of commissioners was filed in the office of the clerk of this court:

In the circuit court of the United States for the district of Oregon.

JOHN R. LAMB AND EMMA S., HIS WIFE, AND Ida Squires,
*vs.*
ISAAC A. DAVENPORT, JAMES P. O. LOWNSdale, Millard O. Lownsdale, Ruth A. Lownsdale, Mary E. Cooper, and Hiram Smith and Hannah M., his wife.

To the circuit court of the United States for the district of Oregon:

In pursuance of, and in obedience to, a decree in the above-entitled cause by said court made, a certified copy of which is hereto annexed,

we, the undersigned, named as commissioners in said decree, do hereby respectfully report and return—

That we have carefully examined the premises in said decree
64 described, and have made partition thereof into two allotments, as we were by the said decree commanded. And we have set off, in severalty, to said Isaac A. Davenport, all that certain parcel of the said premises bounded and described as follows, to wit: Commencing at the southwest corner of the south half of said block G, and running northerly along the west boundary line of said block G one hundred feet; thence easterly and parallel with the south boundary line of said block G one hundred feet; thence southerly and parallel with the west boundary line of said block G one hundred feet, to the south boundary line of said block G; thence westerly and along the said south boundary line of said block G one hundred feet to the place of beginning. And the remainder of said premises in said decree described to the other tenants in common.

That the portion of said premises set off to Isaac A. Davenport is one-fifth of the whole of said premises, quantity and quality relatively considered.

That the said division is, in our judgment, the most beneficial, all circumstances considered, that could be made of such premises; and that, in our judgment, it would not promote the interest of the
65 tenants to sell the said premises and partition the proceeds.

In witness whereof we, the said commissioners, have set our hands to this our report this 28th day of July, A. D. 1869.

J. W. COOK.
JOHN CATLIN.
A. B. HALLOCK.

(Original endorsed:) "Filed August 11th, 1869. R. Wilcox, clerk."

And afterwards, to wit, August 24th, A. D. 1869, the following motion for final decree was filed in the office of the clerk of this court:

In the circuit court of the United States for the district of Oregon.

JOHN R. LAMB ET AL.
*vs.*
ISAAC A. DAVENPORT ET AL.

And now come the complainants, by W. W. Page and W. Lair Hill, their solicitors, and moves the court for a final decree of partition, according to the report of the commissioners herein filed.

W. W. PAGE &
W. LAIR HILL,
*Solicitors for Complainants.*

(Original endorsed:) "Filed August 24th, 1869. R. Wilcox, clerk."

66 And afterwards, to wit, at a regular term of the circuit court for the district of Oregon, begun and holden at the city of Portland, on Monday, the 6th day of September, A. D. 1869:

Present, Hon. M. P. Deady, judge.

And on Tuesday, September 14th, A. D. 1869, being the second judicial day of said term of court, among other the following proceedings were had, that is to say:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

Now, at this day, come the complainants in the above-entitled cause, by Mr. W. Lair Hill, their solicitor, and the said defendant I. A. Davenport, by Mr. W. W. Chapman, his solicitor, and it is ordered that the hearing upon the motion of complainants to confirm the report of the commissioners to make partition be set down for Tuesday, the twenty-first instant.

(S'd) M. P. DEADY, *Judge.*

And afterwards, to wit, on Tuesday, September 21st, A. D. 1869, being the 3rd judicial day of aforesaid term of court, present—Hon. M. P. Deady, judge—among other the following proceedings were had, that is to say:

67 JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

Now, at this day, come the complainants in the above-entitled cause, by Mr. W. Lair Hill, their solicitor, and the said defendant, I. A. Davenport, by Mr. W. W. Chapman, his solicitor, and the court having heard the report of the commissioners heretofore appointed to make partition of the property in controversy, in accordance with the decree herein, and counsel having been heard upon the motion to confirm said report, it is ordered and adjudged that the said report be, and the same is, hereby confirmed.

(S'd) M. P. DEADY, *Judge.*

68 And afterwards, to wit, Sept. 21st, A. D. 1869, the following final decree was entered of record:

United States circuit court, district of Oregon, September 21st, 1869.

JOHN R. LAMB AND EMMA S. LAMB, HIS WIFE, and Ida Squires, complainants,
*vs.*
ISAAC A. DAVENPORT, JAMES P. O. LOWNSDALE, Millard O. Lownsdale by his general guardian, James P. O. Lownsdale, Ruth A. Lownsdale, by her general guardian, John A. Blanchard, Mary E. Cooper, Hiram and Hannah Smith, defendants.

This cause come on to be heard at the September term of this court, 1869, before the Honorable Mathew P. Deady, judge of the district court of the United States for the district aforesaid, upon the report of the commissioners appointed to make partition of said south half of block "G," pursuant to a decree of this court of May term, 1869; and it appearing to the court that the parties aforesaid, the complainants and defendants in this suit, (except Hiram Smith, and Hannah, his wife,) by the decree of this court herein duly given on May 3d, 1869, were adjudged to be the legal owners, and seized of the legal estate
69 and interest in fee-simple of said south half of block "G," as tenants in common; and it further appearing that, in and by

said decree, it was adjudged that Isaac A. Davenport aforesaid was the legal owner, and seized, as aforesaid, of five undivided twenty-fifths of said south half of block "G," and that Mary E. Cooper, James P. O. Lownsdale, Millard O. Lownsdale, and Ruth A. Lownsdale, aforesaid, were each the legal owner, and seized, as aforesaid, of four undivided twenty-fifths of said south half of block "G;" and that Emma S. Lamb and Ida Squires were each the legal owner, and seized, as aforesaid, of two undivided twenty-fifths of said south half of block "G;" and it also appearing from the report filed herein, August 11th, 1869, of the commissioners appointed by the decree of this court aforesaid, to make partition of said south half of block "G," between the tenants in common thereof as aforesaid, that said commissioners had made partition of said south half of block "G," whereby the following portion of said south half of block "G," bounded and described as follows, to wit: Commencing at the southwest corner of the south half of said block "G," and running northerly along the west boundary line of said block "G" one hundred feet; thence easterly and parallel with the south boundary line of said block "G" one hundred feet; thence southerly, parallel with the west boundary line of said block "G," one hundred feet,
70 to the south boundary line of said block "G"; thence westerly and along the said south boundary line of said block "G" one hundred feet, to the place of beginning, was set apart and allotted in severalty to the said Isaac A. Davenport, and the remaining portion of said south half of block "G," described as follows, to wit: Commencing at the southeast corner of the said south half of block "G," thence running northerly along the east boundary line of said block "G" two hundred and thirty feet; thence running westerly on a line parallel with the south boundary line of said block "G" two hundred feet; thence running southerly along the west boundary line of said block "G" one hundred and thirty feet; thence running easterly on a line parallel with the south boundary line of said block "G" one hundred feet; thence running southerly on a line parallel with the west boundary line of said block "G" one hundred feet; thence running easterly along the south boundary line of said block "G" one hundred feet, to the place of beginning, was set apart and allotted in common to the remainder of the tenants in common aforesaid; and it also appearing from the stipulation filed herein at the May term aforesaid, that the complainants and defendants herein (except the said Davenport and Hiram and Hannah Smith) consent and agree that their undivided interest in said
71 south half of block "G" may be set apart and allotted to them in common, according to their respective interest therein.

Therefore, the premises duly considered, it is adjudged and decreed that the partition made by said commissioners, as aforesaid, of said south half of block "G" be confirmed, and is hereby declared effectual and conclusive, so that from henceforth the said Isaac A. Davenport shall be decreed and held to be the owner in severalty of the portion of said south half of block "G," allotted to the said Davenport as aforesaid, described as follows, to wit: Commencing at the southwest corner of the said south half of block "G," and running northerly along the west boundary line of said block "G" one hundred feet; thence easterly and parallel with the south boundary line of said block "G" one hundred feet; thence southerly and parallel with the west boundary line of said block "G" one hundred feet, to the south boundary line of said block "G;" thence westerly and along the said south boundary line of said block "G" one hundred feet, to the place of beginning; and that

the said Mary E. Cooper, James P. O. Lownsdale, Millard P. Lownsdale, Ruth A. Lownsdale, Emma S. Lamb, and Ida Squires shall be deemed and held to be the owners in common, according to their respective interest, as aforesaid, of the remaining portion of said south half of block "G," described as follows, to wit: Commencing at the
72 southeast corner of said south half of block "G," and running thence northerly along the east boundary line of said block "G" two hundred and thirty feet; thence running westerly on a line parallel with the south boundary line of said block "G" two hundred feet; thence running southerly along the west boundary of said block "G" one hundred and thirty feet; thence running easterly on a line parallel with the south boundary line of said block "G" one hundred feet; thence running southerly on a line parallel with the west boundary line of said block "G" one hundred feet; thence running easterly along the south boundary line of said block "G" one hundred feet, to the place of beginning, as aforesaid; and it further appearing that the said Isaac A. Davenport has a lien upon the said south half of block "G" for the sum of eight hundred and seventy-six $\frac{25}{100}$ dollars, and interest thereon at the rate of ten per cent. per annum, from November 12, 1865, for and on account of a like sum paid by said Davenport as owelty on behalf of his cotenants herein.

It is therefore adjudged and decreed that said Davenport is entitled to receive from the parties herein, to whom the last aforesaid mentioned and described portion of said south half of block "G" is allotted in common as aforesaid, the sum of eight hundred and seventy-six $\frac{25}{100}$ dollars, and interest thereon at the rate of ten per cent. per annum, from November 12, 1865; and it is further adjudged and decreed that said Davenport have a lien upon the portion of the said south half of block
"G" last aforesaid, to secure the payment of the sum last
73 aforesaid, with interest thereon, as aforesaid; and that if said payment is not made in full within five days from the date of this decree, then any of the parties to this suit, (except Hiram and Hannah Smith,) upon application to the clerk of this court, shall have execution against the portion of the said south half of block "G" last mentioned, and described as aforesaid for the purpose of making said money, or any part thereof that then may remain unpaid, out of the proceeds thereof; and that said last mentioned portion of said south half of block "G" shall be so offered for sale upon such execution as that there shall be sold thereon only so much thereof as shall be sufficient to make the said money remaining unpaid after deducting the costs and expenses hereinafter decreed to be paid by said Davenport, and to pay the costs and expenses of such execution and sale; and it is further adjudged and decreed that said Davenport shall pay the costs and expenses of this suit up to and inclusive of the decree of this court aforesaid of the May term, 1869, and that the same may be deducted from the amount aforesaid due said Davenport from his cotenants herein, and that the costs and expenses of this suit, since the decree last aforesaid, be bourne by the parties herein in proportion to their interest in said south half
of said block "G;" and it is further ordered and decreed that the
74 clerk of this court tax the costs and expenses aforesaid, and that he allow the commissioners who made the partition herein the sum of five dollars per day for two days each.

(S'd) MATHEW P. DEADY,
*U. S. District Judge, Oregon.*

75, 76, 77.

78 And afterwards, to wit, January, 14th, A. D. 1869, the following "Agreement of parties" was filed in the office of the clerk of this court:

In the circuit court of the United States for the dist. of Oregon.

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT.

To avoid the taking of depositions on the following facts in the above-entitled suit, it is hereby agreed that the following facts shall be considered upon the trial assumed:

First. That the south half of block "G," the land in controversy, is a part of that portion of the Portland land claim set apart by the officers of the land department of the United States Government to Nancy Lownsdale.

Second. That Nancy Lownsdale was the wife of Daniel H. Lownsdale, intermarried with him as alleged in the bill, and that she died about the 15th day of April, 1854, leaving two children by her former
79 marriage, Isabella Ellen & William Gillihan, and by her marriage with Daniel H. two children, Millard O. & Ruth A. Lownsdale; and that her husband, Daniel H. Lownsdale, survived her.

Third. That Daniel H. died about the 4th day of May, 1862, leaving, as his heirs at law, J. P. O. Lownsdale, Millard O. Lownsdale, Ruth A. Lownsdale, Mary E. Cooper, and Emma & Ida Squires, said Emma and Ida being children of Sarah Squires, deceased, who was a daughter of said Daniel H., and the other heirs above named being children of the said Daniel H.

Fourth. That said Mary E. Cooper is the wife of W'm E. Cooper, and said Emma S. Squires is now intermarried with and is the wife of John R. Lamb.

Fifth. That said Emma and John R. Lamb, and Ida Squires are citizens of Kentucky, and said defendants are all citizens of Oregón.

Sixth. That the property in controversy is of the value of over five hundred dollars.

80 Seventh. That patent did not issue for said land till after the death of said Nancy; that a copy of said patent may be read in evidence upon the trial of this cause.

W. W. CHAPMAN,
*Att'y for Def't Davenport.*
W. LAIR HILL, *of Counsel*
*For Counsel for Complainant.*

(Endorsed:) "Filed January 14, 1869. R. Wilcox, clerk."

And afterwards, to wit, January 18th, 1869, the following certificate was filed in the office of the clerk of this court:

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT.
Certificate.

STATE OF OREGON,
*Multnomah County, ss:*

I, Benjamin L. Norden, clerk of said county and State, do hereby certify

that Isaac A. Davenport, of said county, has paid, as appears by the records of the circuit court of said county & State, the sum of eight hun-
81 dred & seventy-six $\frac{25}{100}$ , and the further sum of twelve $\frac{75}{100}$ dollars into court, in the suit of Martin Gillihan vs. S. N. Arrizoni et al.,,that being the amount of owelty & costs in said suit adjudged against him.

In witness whereof I have hereunto set my hand & the seal of said court, the 16th day of January, A. D. 1869.

[CIRCUIT COURT SEAL.] B. L. NORDEN,
*Clerk of the Circuit Court of said State & County.*

[U. S. R. stamp 5-c.]

(Endorsed:) "Filed January 23d, 1869. R. Wilcox, clerk."

And afterwards, to wit, January 23rd, 1869, the following certificate was filed in the office of the clerk of the United States circuit court for dist. of Oregon.

JOHN R. LAMB ET AL. *vs.* I. A. DAVENPORT. } Certificate.

STATE OF OREGON,
*Multnomah County, ss:*

I, B. L. Norden, county clerk and clerk of the county court of
82 the State of Oregon for the above-named county, which is a court of record, and keeper of the seal and records of said county, do hereby certify that I have carefully examined the records of deeds for lands and lots in the county of Multnomah aforesaid, and particularly within the city of Portland, in said county, and have made diligent and careful search for a deed conveyance by W. W. Chapman to A. T. Johnson of the south half of block "G," in the said city, and do thereupon say that after such search, I have been unable to find any such record of deed-conveyance or writing, and that there is none such of record in my office.

In witness whereof I have hereto set my hand & seal this 23rd day of January, A. D. 1869.

[CIRCUIT COURT SEAL.] B. L. NORDEN, *Clerk.*

[U. S. R. stamp 5 c.]

(Endorsed:) "Filed January 18th, 1869. R. Wilcox, clerk."

83 *R. D. Lownsdale's donation certificate.*

Donation certificate 1022. Notification No. 88.

Whereas, in conformity with the provisions of the 7th section of the act of Congress approved September 27, 1850, entitled "An act to create the office of surveyor general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the public lands," and amendments thereto, Daniel H. Lownsdale, of the county of Multnomah, Oregon, claiming a donation right, in virtue of the acts aforesaid, to the following tract of public lands known and designated in the surveys and plats of the United States as the claim No. 40, being parts of sections thirty-three and thirty-four, in T. 1, N. R. 1 E.,

and claim No 66, being parts of sections three and four, in T. 1, S. R. 1 E., bounded and described as follows, to wit: Beginning at a point in the west bank of the Willamette River, thirty-seven links S. 4° W. from the intersection of the base line with said west bank of Willamette River; thence N. 70° 15′ W. 52.89 chains; thence N. 89° W. 23.29, chains; thence S. 20° 15′ W. 14.45 chains; thence S. 68° 45′ E.
84 58.90 chains; thence S. 20° 45′ W. 7.40 chains; thence S. 69° 15′ E. 17.94 chains to the Willamette River; thence with the meanders of said river, down stream, N. 16° 45′ E. 31.28 chains, to the place of beginning, containing 178 $\frac{09}{100}$ acres.

The west half to Nancy Lownsdale, wife of Daniel H. Lownsdale, and the east half to Daniel H. Lownsdale, who having proven to the satisfaction of the register and receiver of the land office for the Willamette District, in Oregon Territory, the fact that such settlement was commenced on the twenty-second day of September, one thousand eight hundred and forty-eight, four years prior to the date hereof; and having, pursuant to the requirements of the acts aforesaid, established, by two disinterested witnesses, the fact of continued residence and cultivation required by the 4th section of said act; now, therefore, be it known that we, Buryman Jennings, register, and A. Lawrence Lovejoy, receiver of the land office aforesaid, do hereby certify to the Commissioner of the General Land Office the facts aforesaid, accompanied by the evidence thereof, in order that a patent may be issued to said claimant for the tract of land above described, provided the said
85 Commissioner shall find no valid objection thereto.

Given under our hands at the land office in Oregon City, this seventeenth day of October, 1860.

(Signed) B. JENNINGS, *Register.*
A. LAWRENCE LOVEJOY, *Receiver.*

LAND OFFICE, OREGON CITY,
*February* 18, 1863.

We hereby certify that the within is a true copy of the original now on file in this office. In witness whereof we have hereunto signed our names and affixed our private seals (this office having no public seal) the day and year aforesaid.

W'M A. STARKWEATHER, *Register.* [SEAL.]
WILLIAM T. MATLOCK, *Receiver.* [SEAL.]

86 *W'm J. Potter & wife to Daniel H. Lownsdale. Copy of deed.*

This indenture made the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and sixty, between William Potter & Isabella Potter, his wife, late Isabella Gillihan, of the first part, and Daniel H. Lownsdale, of the second part, witnesseth: That the said part' of the first part, for and in consideration of the sum of eight hundred dollars them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have remised, released, and quitclaimed, and by these presents do remise, release, and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all their right, title, interest, claim, and demand, & all the right, title, interest, claim, and demand of either of them in or to the tract of land commonly known as the "Portland Land Claim," or to any part or parcel thereof, & also all right, title, claim, and demand which they or either of them now have or may hereafter become enti-

tled to or acquire as the orphan of William Gillihan, deceased, or
87 as his heir, or as the heir of Nancy Lownsdale, mother of the said Isabella, now deceased, to any land or lands in the State of Oregon, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand whatsoever, as well in law as in equity of the said part, of the first part, of, in, or to the above-described premises, and every part and parcel thereof: To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns, forever. In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

WILLIAM J. POTTER. [SEAL.]
ISABELLA ELLEN POTTER. [SEAL.]

Signed, sealed, and delivered in the presence of—
EDWARD M. EANY.
A. C. GIBBS.

STATE OF OREGON,
*Multnomah County, ss:*

Be it remembered that on this 27 day of January, A. D. one thousand eight hundred and sixty, before me, a notary public in and
88 for the said county, personally appeared William J. Potter and Isabella Ellen Potter, his wife, known to me to be the individuals described in and who executed the within conveyance, and in due form of law acknowledged that they signed, sealed, and delivered the same for the uses and purposes therein mentioned; & the said Isabella, on a private examination, apart from her husband, acknowledged that she executed the same freely & without fear or compulsion of any one.

In witness whereof I have hereunto set my hand and affixed my seal the day & year above written.

[SEAL.] ADDISON C. GIBBS,
*Notary Public, Oregon.*

Received for record January 27th, 1860.
D. W. LICHTENTHALER,
*County Clerk.*

THE STATE OF OREGON,
*Multnomah County, ss:*

I, H. C. Coulson, clerk of the county of Multnomah, State of Oregon, do hereby certify that the foregoing copy of deed has been by me compared with the original, and that it is a correct copy of the whole
89 of such original as the same appears of record at my office and in my custody, in book "B," of record of deeds for said county, on page No. 568.

In testimony whereof I have hereunto set my hand, affixed the seal of said court this 21st day of February, A. D. 1868.

[CIRCUIT COURT SEAL.] H. C. COULSON, *Clerk.*
By ED. BARSTON, *Deputy.*

[U. S. R. stamp, 5 c., canceled.]

January 23rd, 1869, the following proofs were filed in the office of the clerk of the United States circuit court, dist. of Oregon.

In the circuit court of the United States for the district of Oregon.

JOHN R. LAMB & OTHERS
*vs.*
I. A. DAVENPORT & OTHERS. } In equity.

The following papers, purporting to be deeds, may be read in evidence upon the hearing without further proof of their execution:

1. A. T. Johnson to G. Montgomery and Haines, dated the 28th April, 1851.

90 2. George Montgomery to J. D. Haines, dated 9th day of August, 1852.

3. I. D. Haines to I. Davenport, mortgage and power, dated 1st March, 1854.

4. R. H. Haines to Davenport, dated 7th Feb'y, 1855.

5. I. D. Haines, by Davenport, att'y, to Tho's Frazer, dated 4th January, 1855.

6. Frazer & wife to Davenport, 16th Jan'y, 1855.

7. Davenport to Hendee, dated Nov. 26, 1855.

8. Hendee to Davenport, dated April 8th, 1861. The originals may be withdrawn by leaving copies.

W. LAIR HILL,
*Of Counsel for Complainants.*

(Original endorsed:) Filed January 23d, 1869. R. W. Cox, cl'k.

91 *Abner S. Johnson to George Montgomery and Robert Haines. Copy of deed.*

Know all men by these presents that I, Abner S. Johnson, of the town of Portland, county of Washington, Territory of Oregon, for and in the consideration of the sum of one hundred and seventy-five dollars in good and lawful money to us in hand paid, the receipt whereof is hereby acknowledged, do grant, bargain, release, confirm, and quitclaim unto George Montgomery and Robert Haines, of the said town of Portland, Washington County, and Territory aforesaid, all the following-described town property, to wit: the south half of *of* block marked (G,) upon the plat of said town, and containing eight lots, measuring fifty feet each in front, and running back each one hundred feet; and I further covenant that if I shall obtain title to the said lot from the United States, I will convey the same to the said George Montgomery and Robert Haines by deed of general warranty.

In testimony whereof I have hereunto set my hand and seal this the 28th day of April, A. D. 1851.

[SEAL.] ABNER T. JOHNSON.

92 TERRITORY OF OREGON, *Washington County:*

On this the 28th day of April, A. D. 1851, Abner S. Johnson, whose signature appears to the annexed deed, personally appeared before me, mayor in and for the city of Portland, and acknowledged the said deed to be his voluntary act and deed.

Given under my hand and seal this the 28th day of April, A. D. 1851.

[SEAL.] U. D. O. BRYANT,
*Mayor of the City of Portland.*

TERRITORY OF OREGON, *Washington County, ss:*

I hereby certify that the within instruments of writing were received for record on the fourteenth day of August, and were recorded on page one hundred and seventeen of Book B of the records of deeds, in the office of the recorder of Washington County, this twenty-fourth day of August, A. D. eighteen hundred and fifty-two.

In testimony whereof I have hereunto set my hand and affixed my private seal (there being no seal of office provided) at office the day and year last above written.

[SEAL.] W. S. CALDWELL,
*Clerk and Recorder.*

93 *George Montgomery to Israel D. Haines.—Copy of deed.*

Know all men by these presents, that I, George Montgomery, of the city of Portland, county of Washington and Territory of Oregon, for and in consideration of the sum of one hundred dollars to me in hand paid by Israel D. Haines, (resident of the same place,) the receipt whereof is hereby acknowledged, do hereby convey, remise, release, quitclaim, sell, and forever confirm unto the said Israel D. Haines, his heirs or assigns, the following described property, to wit: the undivided half of the south half of block marked "G," situated in the city of Portland, Oregon Territory, and so marked upon the plat or plan thereof, and containing eight lots, each measuring fifty feet front and one hundred feet deep, together with all the appurtenances thereunto belonging or in anywise appurtaining: To have and to hold the above released premises to the said I. D. Haines, his heirs or assigns, to his or her only proper use and behoof forever. And I, the said George Montgomery, for myself, my heirs, executors, or administrators, do covenant with the said I. D. Haines, his heirs, or assigns, that the above-
described premises are free from all incumbrances made or suf-
94 fered by me, and that I will, and my heirs, executors, & administrators shall, warrant and defend the same to the said I. D. Haines, his heirs or assigns, forever, against the claims and demands of all persons claiming by, through, or under me, but against none other.

In witness whereof I, the said George Montgomery, have hereunto set my hand and seal at Portland, O. T., this 9th day of August, A. D. 1852.

[SEAL.] G. MONTGOMERY.

Signed, sealed, and delivered in presence of—
A. C. BONNELL.

TERRITORY OF OREGON,
*Washington County, City of Portland, ss:*

Be it remembered, that on this 9th day of August, A. D. 1852, before me, A. C. Bonnell, mayor of the said city of Portland, personally appeared George Montgomery, to me known, whose name is subscribed to the within instrument of writing, and acknowledged that he signed & sealed the same as his free and voluntary act and deed, for the uses and purposes therein expressed.

Given under my hand and seal on the day and year above written.

[SEAL.] A. C. BONNELL,
*Mayor of Portland.*

95 TERRITORY OF OREGON, *Washington County, ss:*

I hereby certify that the within and foregoing instruments of writing were received for record on the fourteenth day of August, and were recorded on the one hundred and eighteenth page of book "B" of the record of deeds in the office of the recorder of Washington County, this twenty-fifth day of August, A. D. eighteen hundred and fifty-two.

In witness whereof I have hereunto set my hand and affixed my private seal (there being no seal of office provided) at office the day and year last above written.

[SEAL.]

W. S. CALDWELL,
*Clerk and Recorder.*

96 *Israel D. Haines to Isaac A. Davenport.—Copy of mortgage.*

Know all men by these presents, that I, Israel D. Haines, of Portland, Oregon, (but for some time resident at Jacksonville, county of Jackson,) of the first part, for and in consideration of two hundred and eighty dollars to me in hand paid by Isaac A. Davenport, of the city of Portland, Washington County, Oregon, the receipt whereof is hereby acknowledged, have mortgaged and sold and quitclaim to, and by these presents do mortgage, sell and quitclaim, all my right, title, and interest to the within-described property, to wit: the southern two-thirds of lot No. three, (3,) in block number twenty-two, (22;) also the southern half of block G, (the above lot and block known as such in the town plat of Portland,) together with all the improvements and appurtenances thereto belonging, to the said Isaac A. Davenport, his heirs, administrators, and assigns forever. Now, the conditions of the above deed of mortgage is such that if the said Israel D. Haines shall pay, or cause to be paid, on or before the expiration of eight months from this date, the sum of two hundred and eighty (280) dollars to said Isaac A. Davenport, his heirs, or assigns, then this deed of mortgage shall be
97 cancelled; otherwise to remain in full force. After the expiration of said eight months, if the same or any part thereof be unpaid, I, the said Israel D. Haines, do hereby authorize the said Isaac A. Davenport to advertise and sell the above-described property to the highest bidder, to receive the money, and to pay the surplus, if any, to said Israel D. Haines, after dedunting the expenses of sale & advertisement.

The above mortgage is given as collateral security for a certain note of same date for the sum expressed in said mortgage.

Witness my hand and seal this first day of March, eighteen hundred and fifty-four.

I. D. HAINES. [L. S.]

Signed, sealed, & delivered in presence of—

TERRITORY OF OREGON, *Washington County, ss:*

On this 1st day of March, A. D. 1854, before me, Anthony L. Davis, a justice of the peace in and for said county, personally appeared I. D. Haines, whose name is subscribed to the foregoing instrument of writing, and acknowledged that he signed and executed the same as his act and deed, for the purposes therein mentioned.

Given under my hand the day and year above written.

ANTHONY L. DAVIS,
*Justice of the Peace.*

98 TERRITORY OF OREGON,
*County of Washington, ss:*

I hereby certify that the foregoing instruments of writing were received for record, March first, at 11 o'clock, a. m., and were recorded on the one hundred and seventieth and one hundred & seventy-first pages of book of mortgage record in the office of the recorder of Washington County, this sixth day of March, A. D. eighteen hundred and fifty-four.

Witness my hand and the seal of said county hereunto affixed the day and year last above written.

[COUNTY SEAL.] W. S. CALDWELL,
*Auditor & Recorder.*

99 *Robert H. Haines to Isaac A. Davenport.—Copy of deed.*

This indenture, made this seventh day of February, in the year of our Lord one thousand eight hnndred and fifty-five, between Robert H. Haines of the first part, and Isaac A. Davenport of the second, witnesseth:

That the said party of the first part, for and in consideration of the sum of two hundred and forty dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is acknowledged, has aliened, remised, released, conveyed, and confirmed, and by these presents does alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all his interest, being the half interest with his brother, Israel D. Haines, of that certain lot or parcel of land, known as the southern half of block G, in the city of Portland, Multnomah County, Oregon Territory, being known in the plat of said city as such, together with all and singular the tements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, to the said property, possession, claim, and demand whatsoever, as well in law as in equity of the said party of the first part, of, in, and to the above-described premises, and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever. And the said party of the first part, for his heirs, executors, administrators, does hereby covenant, promise, and agree, to and with the said party of the second part, his heirs and assigns, that he has not made, done, committed, executed, or suffered any act or acts, thing or things, whatsoever, whereby, or by means whereof the above-mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall, or may be impeached, charged, or incumbered in any manner or way whatsoever.

100

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL.] R. H. HAINES.

Signed, sealed, and delivered in presence of—
NELSON NORTHROP.
A. P. DENNISON.

101 TERRITORY OF OREGON,
*Multnomah County, ss:*

On this 7th day of February, 1855, before me personally came R. H. Haines, to me known to be the individual described in and who executed the above conveyance, and acknowledged that he executed the same for the purposes therein mentioned.

A. P. DENNISON,
*Recorder of the City of Portland, and ex-officio Justice of the Peace.*

TERRITORY OF OREGON,
*County of Multnomah, ss:*

I hereby certify that the within instruments of writing were received for record February 7th, A. D. 1855, and were recorded on the twelfth and thirteenth page of book "A" of the record of "deeds" in the office of the recorder of Multnomah County, this twenty-seventh day of February, A. D. 1855.

In testimony whereof I have hereunto set my hand and private seal, (there being no seal of office, yet provided,) at Portland, the day and year last above written.

[SEAL.] SHUBRICK NORRIS,
*Auditor & Recorder.*

(Original endorsed:) "Filed for record this 7th Feb'y, 1855. S. Norris, recorder."

102 *Israel D. Haines to Thomas Frazer.—Copy of deed.*

This indenture, made this fourth day of January, in the year of our Lord one thousand eight hundred and fifty-five, between Isaac Alfred Davenport, attorney-in-fact for Israel D. Haines, of the first part, and Thomas Frazer, witnesseth:

That the said party of the first part, for and in consideration of the sum of five hundred and forty dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has aliened, remised, released, conveyed, and confirmed, and by these presents does alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot or parcel of land, known as the southern two-thirds of lot number three, (No. 3,) in block number twenty-two, in the city of Portland, Oregon Territory, together with all and singular the buildings, houses, or improvements thereon; also, all the interest of said Israel D. Haines in and to the southern half of block G, the above lot and block being known as such in the town plat of Portland:

103 Together with all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, in and to said property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the above-described premises, and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs, and assigns,

forever. And the said party of the first part, for his heirs, executors, administrators, doth hereby covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that he has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby, or by means whereof, the above-mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be, impeached, charged, or encumbered in any manner or way whatsoever.

The above property is sold in accordance with deeds of mortgage, and powers of attorney, recorded in one hundred and sixty-eighth,
104 one hundred and sixty-ninth, one hundred and seventieth, and one hundred and seventy-first pages of book of mortgage records of Washington County.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

ISRAEL D. HAINES.

By his attorney-in-fact,
[SEAL.] ISAAC ALFRED DAVENPORT.

Signed, sealed, and delivered in presence of—
W'M S. FRAZAR.
ANTHONY L. DAVIS.

TERRITORY OF OREGON,
*Multnomah County, ss:*

Be it remembered that on this 16th day of January, A. D. 1855, personally appeared before me, the undersigned, a justice of the peace within and for the county aforesaid, Israel D. Haines, by his attorney-in-fact, Isaac Alfred Davenport, known to me to be the person whose name is subscribed to the foregoing deed, and acknowledged that he signed, sealed, and delivered the same as his act and deed for the purposes therein mentioned.

Given under my hand this day and year above written.

ANTHONY L. DAVIS,
*Justice of the Peace.*

TERRITORY OF OREGON,
*County of Multnomah, ss:*

I hereby certify that the within instruments of writing were received for record January eighteenth, and were recorded on the second
105 and third pages of book "A" of the record of "deeds," in the office of the recorder of Multnomah County, this twentieth day of February, A. D. eighteen hundred and fifty-five.

In testimony whereof I have hereunto set my hand and private seal (there being no seal of office yet provided at Portland) the day and year last above written.

[SEAL.] SHUBRICK NORRIS,
*Auditor & Recorder.*

(Original endorsed:) "Filed for record this 18th Jan'y, 1855.
"S. NORRIS,
"*Recorder.*"

106 *Tho's Frazar and wife to Isaac A. Davenport.—Copy of deed.*

This indenture, made the sixteenth day of January, in the year of our Lord one thousand eight hundred and fifty-five, between Thomas

Frazar and Mary E. Frazar, his wife, of the first part, and Isaac A. Davenport, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of five hundred and forty dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, and quitclaimed, and by these presents do remise, release, and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all that certain lot or parcel of land known as the southern two-thirds of lot number three, (No. 3,) in block number twenty-two, in the city of Portland, Oregon Territory, together with all and singular the buildings, houses or improvements thereon; also, all the interest obtained by deed from Israel D. Haines in and to the southern half of block G, the said lot and block being known as such in the town plot of Portland, together with all and singular the tenements, hereditaments, and appurtenances thereunto belong-
107 ing, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest in and by the said property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, and his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

THO'S FRAZAR. [SEAL.]
MARY E. FRAZAR. [SEAL.]

Signed, sealed, and delivered in presence of—
ANTHONY L. DAVIS,
W'M S. FRAZAR.

TERRITORY OF OREGON,
*Multnomah County, ss:*

Be it remembered that on this 16th day of January, A. D. 1855, before me, Anthony L. Davis, a justice of the peace in and for the county aforesaid, personally appeared Tho's Frazar, the grantor in the foregoing deed named, who is personally known by me to be the party subscribing thereto, and acknowledged that he did sign, seal, &
108 deliver the same for the uses and purposes therein named; as also Mary E. Frazar, wife of the said Tho. Frazar, who, being by me examined separate and apart from her husband, acknowledged that she did sign, seal, and deliver the same freely, voluntarily, and without compulsion on the part of any person or persons, as her relinquishment of dower thereto.

Given under my hand this sixteenth day of January, A. D. 1855.

ANTHONY L. DAVIS,
*Justice of the Peace.*

TERRITORY OF OREGON,
*County of Multnomah, ss:*

I hereby certify that the within instruments of writing were received for record January eighteen, and were recorded on the first and second pages of book "A," of the records of "deeds" in the office of the re-

corder of Multnomah County, this twentieth day of February, A. D. eighteen hundred and fifty-five.

In testimony whereof I have hereunto set my hand and private seal (there being no seal of office yet provided) at Portland, the day and year above written.

[SEAL.] SHUBRICK NORRIS,
*Auditor & Recorder.*

(Original endorsed:) "Filed this 18th Jan'y, 1855. S. Norris, recorder."

109 *Isaac A. Davenport to Denny H. Hendee.—Copy of deed.*

This indenture, made the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and fifty-five, between Isaac A. Davenport, of the first part, and Denny H. Hendee, of the second part, witnesseth: That the said party of the second part for and in consideration of the sum of one hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all that certain lot or parcel of land known as the south half of block "G," in the city of Portland, Multnomah County, Oregon Territory, known and described as such in the common plat of said city, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the
110 reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest whatsoever to the said property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns forever; and the said Davenport will warrant and defend the said property to the said Hendee at its now value, with interest accruing, against the legal claims of all persons whatsoever, the United States only excepted.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL.] I. A. DAVENPORT.

Signed, sealed, and delivered in presence of—
F. J. MOLTHROP,
W'M S. FRAZAR.

111 TERRITORY OF OREGON,
*County of Multnomah, ss:*

Be it remembered that this, the twenty-sixth day of November, A. D. one thousand eight hundred and fifty-five, before me, a justice of the peace in and for said county, personally appeared Isaac A. Davenport, known to me to be the individual described in, and who executed, the within conveyance, and in due form of law acknowledged that he signed, sealed, and delivered the same for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my seal the year and day above written.

[SEAL.] FRANCIS PANTON,
*Justice Peace N. P. P.*

TERRITORY OF OREGON,
*County of Multnomah, ss :*

I hereby certify that the within instruments of writing were received for record February twentieth, A. D. 1856, and were recorded on the one hundred and forty-fifth and sixth pages of book "A" of the records of deeds in the office of the recorder of Multnomah County, this twenty-seventh day of February, A. D. 1856.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at Portland, the day and year last above written.

[COUNTY SEAL.] SHUBRICK NORRIS,
*Auditor & Recorder.*

112 *D. H. Hendee & wife to I. A. Davenport.—Copy of deed.*

This indenture, made the eighth day of April, in the year of our Lord one thousand eight hundred and sixty-one, between D. H. Hendee & wife, of the first part, and I. A. Davenport, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, (and other valuable considerations,) lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has remised, released, and quit-claimed, and by these presents does remise, release, and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all that certain lot or parcel of land lying and being in *in* the city of Portland, Multnomah County, Oregon, and known as the south half of block "G," as described on the plat of said city of Portland, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and
113 remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal, the day and year first above-written.

D. H. HENDEE. [SEAL.]
E. S. HENDEE. [SEAL.]

In presence of—
SAM'L E. BARR,
H. G. THORNTON.

STATE OF OREGON,
*Multnomah County, ss :*

On this 8th day of April, A. D. 1861, personally appeared before the undersigned, a justice of the peace in and for said county, D. H.

Hendee and E. S. Hendee, his wife, known to me to be the individuals described in and who executed the foregoing instrument, and acknowledged *that* the execution the same for the uses and purposes therein mentioned; and the said E. S. Hendee, his wife, on a separate
114 examination from her husband, acknowledged that she signed the same freely and without compulsion from any one.

SAM'L E. BARR, *J. P.*

THE STATE OF OREGON,
*Multnomah County:*

I certify the within instruments of writing were received for record on the eighth day of April, A. D. 1861, and are recorded in book "C" of deeds, on page 185.

[COUNTY COURT SEAL.] SHUBRICK NORRIS,
*County Clerk.*
By H. BOYD,
*Deputy.*

115 *Deposition of I. A. Davenport.*

U. S. circuit court, district of Oregon.

JOHN R. LAMB ET AL. } In equity.
*vs.*
I. A. DAVENPORT. }

The deposition of I. A. Davenport, taken and subscribed before me, R. Wilcox, commissioner of the United States circuit court for the district of Oregon, on the 18th day of December, A. D. 1868, between the hours of 2 and 5 o'clock p. m., and on the 22d day of the same month, in pursuance of the agreement and consent of the parties, to be read and used in evidence on the trial of the above-entitled cause, W. Lair Hill, esq., appearing for the complainant, and W. W. Chapman, esq., for the defendant.

I. A. DAVENPORT, being first duly sworn, deposes and testifies as follows:

Int. 1. Are you one of the defendants in this suit?
Ans. Yes.
2d. Are you acquainted with the property in dispute?
Ans. Yes.
116 3d. State whether or not you ever made a bargain or contract with D. H. Lownsdale respecting the property in controversy, or *a* any contract having relation to the property in controversy; and if you did either, state which, and what it was.
(Objected to as leading & incompetent.)
Ans. In 1860 I held property on the levee, by occupation and large improvements made there. Mr. Lownsdale came to me and offered to sell me that property on all the title he had, or might expect to have, being a portion of block 75. Knowing that a difficulty was likely to occur about the title to that and other property, I submitted to him a list of all the property that I believed I then rightly held, among the rest the S. ½ of block G; and he pointed out to me such as he thought might be defective through him; and when he talked upon it, the claims that he thought he had upon the property was reduced to about three lots. I mentioned particularly the S. ½ of block G, stating that his name

was to that title in what is called the omnibus deed, and we mutually agreed that for $2,000 he would give me a confirmatory title to all the property that I had submitted to him that he thought might require it.

4th. State whether the consideration which you paid him was or was not to procure anything besides block 75; and if so, what was it
117 to procure besides that block?

(Objected to incompetent, and because it———. Question withdrawn.)

5. State whether or not you paid to Mr. Lownsdale the $2,000 before mentioned.

(Objected to as immaterial.)

Ans. I paid it.

6th. State whether the consideration which you paid him was or was not to procure anything besides block 75; and if so, what was it to procure besides that block?

(Objected to as incompetent.)

Ans. It was to procure the title to one-half of block 75, and of such of my property as might require it, I having submitted the whole of my property to him.

7th. Was you then claiming to be the owner of the south half of block G?

(Objected to as immaterial.)

Ans. It was, for years before. At that time I had sold the south ½ of block G to Hendee, but still had so much of an interest in it that I had given a warrantee deed to it.

8th. Before submitting to Mr. Lownsdale your list of property, had you or not talked over or agreed upon the terms of your contract?

(Objected to as immaterial.)

Ans. Yes, for about three weeks beforehand; I don't know exactly how long.

118 9th. State whether or not it was on the condition of the execution of the deeds that you have mentioned, and no further claims by him respecting the property mentioned in that list, that you paid him the consideration.

(Objected to as leading & irrelevant, & because it is not the best evidence.)

Ans. At the time that I purchased that property I considered the title to that property on the levee a very doubtful one; and the confirmation to my other property was a sine que non for my other property in the transaction.

10th. Look at the paper now shown you herewith filed, and marked Exhibit "A," and state whether it has any relation to the contract to which you have referred between you and D. H. Lownsdale.

(Objected to because the execution of the instrument has not been proved, & that that is immaterial, irrelevant, & incompetent.)

Ans. It has. It was one of the deeds that was executed at the time in the fulfillment of that contract.

11th. Look at the paper now shown you herewith filed, and marked Exhibit "B," and state whether it has any relation to the contract to which you have referred between you and D. H. Lownsdale.

(Same objections interposed, and no notarial seal attached to the paper.)

119 Ans. It has. It was one of the deeds that was executed at the time in the fulfillment of that contract.

12th. State whether, in addition to your warrantee to Hendee, the statements and transactions between you and Mr. Lownsdale before

mentioned furnished any inducement on your part to purchase back the property from Hendee.

(Objected to as immaterial and incompetent.)

Ans. I should have purchased it back from Hendee in any case to make my warrantee good, but knowing that Mr. Lownsdale's name was to the title, and from the conversations with him, I had never had any doubt as to the equity and legality of the title as in myself as derived from him.

By agreement the examination is continued until Tuesday next at one o'clock p. m.

TUESDAY, *December 22d*, 1868—1 *o'clock p. m.*

Cross-examination of I. A. Davenport by W. Lair Hill:

1st. What time in 1860 was it you had the 1st conversation with Mr. Lownsdale referred to in your direct examination?

Ans. I had a number of conversations with him for two or three weeks previously with direct reference to the purchase of block 75, and
120 the confirmation of the other property I had acquired—I mean previously to June the 11th, which I think is the date.

2d. To which of these conversations was it that you referred in your direct examination?

(Objected to because it does not refer to any subject-matter spoken of by the witness.)

Ans. To either or all of them; they were all on the same subject and were continuous.

3d. Which of these conversations did you give in answer to the 3d direct interrogatory?

Ans. I do not understand the question.

4th. Did you state, in your direct examination, the whole of the conversation between you and Mr. Lownsdale, referred to by you?

Ans. It couldn't be possible in this length of time; they would take a volume. I have stated the tenor of them, as far as they have a bearing on the points at issue.

5th. Now will you state what else was said in those conversations, whether you think it has a bearing on the question at issue or not?

Ans. The whole of the conversation, as I remember, then had a bearing upon this one subject. In pointing out my property, I could not get Mr. Lownsdale to say that the title to any portion of it was not equitably my own. He himself pointed out the defects in the title to property in deed marked B. I had previously been advised of the defect in lot 5, block 4.

121 (The latter clause of the last answer objected to by defendants' counsel, because it is going beyond the question propounded.)

6th. The substance of the conversations was, that he would confirm to you your title to said property contained in the list you showed him as might require it, and you would pay him $2,000 therefor.

(Objected to, because it is not a question, but an assertion of fact without an interrogatory.)

Ans. Yes.

7th. When was it you made a deed of the property in controversy to Hendee?

Ans. I sold the property to Hendee long anterior. I think it was in 1855. It was 26 November, 1855.

8th. What was the consideration for that deed?

(Objected to because the deed is not in evidence and is not referred to in the examination.)

Ans. The consideration on the paper is one hundred dollars.

9th. When was it you bought the property back from Hendee?

Ans. I believe it was in some portion of 1861.

10th. State whether the conversations you had formerly had with Lownsdale, were any part of the inducements which led you to repurchase it from Hendee?

122 Ans. I should have purchased it from Hendee in any case, as he could not build on it, as they had taken temporary possession of it, and I was in honor bound to make my warrantee good.

11th. Who had taken temporary possession of it?

Ans. I did not know at the time. I was told that it was Ike Smith.

12th. How long had Ike Smith had possession of it?

Ans. I don't know. It was out of my possession, and Hendee was away in California.

13th. Was Hendee ever in possession of it?

Ans. Yes.

14th. What do you mean by saying that they had taken temporary possession of it?

Ans. I saw a fence around a portion of it, which was either taken away by themselves or somebody else, or by Hendee when he returned from California.

15th. Did Hendee take actual possession of it when he returned from California?

Ans. He did.

16th. Did he remain in possession until the time of your purchase from him?

Ans. I considered that he or I never lost possession.

17th. Did Dan'l H. Lownsdale, to your knowledge, prior to your purchase of Hendee, set up any claim adversely to yours in the property?

Ans. None to my knowledge. I once asked D. H. Lownsdale, long time previously, the meaning of that fence being put up around

123 the property. It was while Hendee was away. He replied that it was for the convenience of fencing up other property, but not with the intention of holding it.

18th. When was that?

Ans. I don't recollect what time.

19th. Do you know that prior to June 11th, 1860, Daniel H. Lownsdale had claimed the S. ½ of block "G," as the property of the heirs of Nancy Lowndsdale?

Ans. I do not; on the contrary, in every conversation with regard to it, he assented to the right to it through me.

20th. Was not the lessee of Nancy Lownsdale's heirs in the actual possession of that S. ½ of block G, on the 11th day of June, 1860, and prior thereto, and continuously up to 1864 or '5?

Ans. I know nothing of the transactions of Lownsdale's heirs with regard to it?

21st. Did not the lessee of Nancy Lownsdale's heirs, namely, Hiram Smith, claim possession of that property, and bring an action against D. H. Hendee for possession, and do you not know that in such action they recovered the possession against Hendee?

(Objected to because not the best evidence. The records will show what suit was brought & what was recovered.)

Ans. I do not; I do know that Hendee built a house upon it, and

124 he told me that he had a difficulty about it before a magistrate, and was too poor to continue a lawsuit about the matter. I told him I would take the property back and build a house whenever I wanted it.

22d. Did you not just now state that you told Hendee they might go to law with you about it?

Ans. It is very likely I said so. I don't remember the exact words.

23d. Do you not know that, in the action before the magistrate against Hendee, both Dan'l H. Lownsdale and yourself were called and examined as witnesses—one for, and the other against Hendee?

(Objected to, there being no foundation laid for reference to that action.)

Ans. I have no recollection that I was. I have some recollection of the trial before Esq. Risley. I don't think I was called as witness. I don't think I was present. I recollect speaking to Risley afterwards, and he admitted that his jurisdiction or decision in the matter was a wrong one.

24th. Let me refresh your memory, Dr. Was not this paper, now marked Exhibit "C," and shown you, exhibited to you when you were a witness in that action against Hendee?

Ans. I have no recollection of ever having seen the paper before.

125 25th. Can you state positively that you were not a witness for Hendee in that action?

Ans. I cannot.

26. Have you at any time had actual possession of the S. ½ of block "G?"

Ans. I always considered the delivery of property by deed and record in the courts the best possession.

27th. Have you ever had any other possession than your deeds and records?

Ans. Hendee built a house on it, as my assign.

28th. Have you ever had, since your repurchase from Hendee, the actual possession of that property?

Ans. If I had it then, I never lost it; consequently I have it now.

29th. Did you have it then?

Ans. Yes, by my assign. He took possession of it.

30th. Have you not already stated in this examination that some other persons took possession while Hendee was gone?

Ans. No. I stated they fenced it in, and the reason given to me was that it was for the convenience of fencing other property. I did not suppose that, at that time, it was intended to hold adverse possession of the property.

126 31st. Did Hendee do any other act than the making the deed to you toward giving you the possession upon your repurchasing it from him?

Ans. He showed me where he built a house upon it, and he left the foundation or sleepers of the house upon it.

32d. What had become of the balance of the house?

Ans. I don't know.

33d. Have you done since then any further acts of possession, such as improvements or other actual occupation of the premises?

Ans. No.

34th. Do you not know that the property was enclosed by a fence built by some other person than yourself or your assign from prior to the time of your repurchase from Hendee up to 1864 or '5?

Ans. I know that, at about the time Hendee was there, it was par-

tially enclosed; so were the streets, and the reason given for it was as I have stated in my former answer.

35th. How much of that fence did Hendee pull down when he returned from California, and how long did it remain down?

(Objected to as immaterial.)

Ans. I don't know. The fence never troubled me. If the property was mine, the fence didn't make it not mine.

36th. State, as near as you can, the date of the conversation
127 with Dan'l H. Lownsdale, in which he said that that fence was merely put there for convenience, and not to hold it.

Ans. It must have been previously to the year 1860. I don't recollect. It must have been while Hendee was in California.

37th. Was there anybody else present at that conversation besides you and Mr. Lownsdale?

Ans. I think not.

38th. Is that the whole of the conversation between you and Mr. Lownsdale at that time?

Ans. It was the whole in reference to this property. I can't recollect what else was said.

39th. Was there any other person present at the time of any other of the conversations between you and Mr. Lownsdale?

Ans. Some of the latter conversations referred to, as in 1860, were in the house of T. J. Holmes, now deceased, and he was present at some of them. He got a confirmatory title about the same time.

(S'd) I. A. DAVENPORT.

DISTRICT OF OREGON, *ss:*

I, R. Wilcox, commissioner of the U. S. circuit court for the district of Oregon, hereby certify that the foregoing deposition was taken before me at the time mentioned, and reduced to writing by myself; that, before examination, the said witness was duly sworn to
128 testify the truth, the whole truth, and nothing but the truth, and that the said deposition was then read by said witness, and thereupon subscribed by him.

Witness my hand and seal this 22d day of December, 1868.

[U. S. COURT SEAL.] R. WILCOX,
*U. S. Commissioner, Oregon.*

*Daniel H. Lownsdale to I. A. Davenport.—Copy of deed.*

Know all men by these presents that I, Daniel H. Lownsdale, of Portland, Multnomah County, Oregon, for and in consideration of the sum of two thousand dollars to me in hand paid by Isaac A. Davenport, of the same place, the receipt of which is hereby acknowledged, have granted, bargained, sold, and by these presents do grant, bargain, sell, convey, and confirm unto the said Isaac A. Davenport and his heirs and assigns, forever, the undivided half of block numbered seventy-five, situated, lying, and being on the east side of Front street, and between Yamhill and Taylor streets, in the city of Portland, county of
129 Multnomah, and State of Oregon, together with all and singular the rights, privileges, and appurtenances thereto belonging, or in anywise appertaining; and I, the said Daniel H. Lownsdale, for myself and my heirs, executors, administrators, and assigns, do covenant and agree to and with the said Isaac A. Davenport, and his heirs, executors, administrators, and assigns, that I am the owner of the above-

described premises; that I have right and power to sell the same; that the said premises are free and clear of all incumbrances had, made, done, permitted, or suffered by me, or any person under me, or by my authority. And I, the said Daniel H. Lownsdale, and my heirs, executors, administrators, and assigns shall forever warrant and defend the said premises, with the appurtenances, to the said Isaac A. Davenport, his heirs and assigns, against the lawful claims of all persons, the United States of America alone excepted. In testimony whereof I have hereto set my hand and seal this eleventh day of June, 1860.

DANIEL H. LOWNSDALE. [SEAL.]

Signed, sealed, and delivered in presence of—
THO'S CARTER,
W'M L. MCEWAN.

MULTNOMAH COUNTY, OREGON:

130 On this 11th day of June, 1860, before W'm L. McEwan, a notary public for the county of Multnomah, State of Oregon, personally appeared Daniel H. Lownsdale, the grantor in the foregoing deed named, personally known to me as such, and acknowledged that he did sign, seal, and deliver the foregoing deed for the uses and purposes therein stated.

[W. L. M'EWAN'S SEAL.] W'M L. MCEWAN,
*Notary Public.*

STATE OF OREGON, *Multnomah County, ss:*

I hereby certify that the within instruments of writing were received for record June 11th, 1860, and are recorded on page 717 of the Record of Deeds, Book "B," in the office of the recorder of Multnomah County, Oregon.

Witness my hand and official seal this 14th day of June, 1860.

[COUNTY SEAL.] D. W. LICHLENTHALER,
*County Clerk.*

Exhibit "A." Original endorsed: "Filed June 11, 9½ o'clock, 1860. D. W. Lichlenthaler, clerk."

131 *Lownsdale to Davenport.—Copy of deed.*

Know all men by these presents that I, Daniel H. Lownsdale, of Portland, Multnomah County, Oregon, in consideration of the sum of one dollar to me in hand paid by Isaac A. Davenport, of the same place, & for other valuable considerations, and to confirm the title and possession of the said I. A. Davenport in and to the property hereinafter described under one Benjamin Allen as to lots number one and two in block twenty-two, and of one William M. King as to eight-tenths of lot number five in block number four, do grant, bargain, sell, and quit-claim, and by these presents have granted, bargained, sold, and quit-claimed unto the said Isaac A. Davenport, and to his heirs and assigns forever, lots number one and two in block number twenty-two and eight-tenths of lot number five in block number four, said eight-tenths measuring fifty feet on First street and eighty feet on Taylor street, all of said property being situate in the city of Portland, county of Multnomah, and State of Oregon: To have and to hold the said premises, with the appurtenances, unto the said Isaac A. Davenport, and to his heirs, and assigns, forever.

In testimony whereof I have hereto set my hand and seal this eleventh day of June, one thousand eight hundred and sixty.

132 DANIEL H. LOWNSDALE. [SEAL.]

Signed, sealed and delivered in presence of
THO'S CARTER,
W'M L. MCEWAN.

MULTNOMAH COUNTY, OREGON:

On this eleventh day of June, 1860, before me, William L. McEwan, a notary public for the county and State aforesaid, personally appeared Daniel H. Lownsdale, the grantor in the foregoing deed named and personally known to me as such, and acknowledged that he did sign, seal and deliver the foregoing deed for the uses and purposes therein stated, as witness my hand and seal affixed the day and year aforesaid.

{ W'M L. M'EWAN, SEAL. } W'M L. MCEWAN, *Notary Public.*

STATE OF OREGON, *Multnomah County, ss:*

I hereby certify that the within instruments of writing were received for record, June 11th, A. D. 1860, and are recorded on page 718 of the Record of Deeds, book "B," in the office of the recorder of Multnomah County, Portland, Oregon.

Witness my hand and official seal this 15th day of June, A. D. 1860.

[COUNTY SEAL.] D. W. LICHTENTHALER, *County Clerk.*

Exhibit "B." Original endorsed. "Filed June 11th, 1860. D. W. Lichtenthaler, clerk."

133 *Daniel H. Lownsdale for self and minor heirs of Nancy, dec'd, and Hiram Smith—Copy of articles of agreement.*

Articles of agreement made and entered into this eighteenth day of October, A. D. eighteen hundred and fifty-nine, between Daniel H. Lownsdale of the city of Portland, and State of Oregon, for himself and for the minor heirs of his late wife Nancy Lownsdale, dec., viz: Isabella Gillihan, William T. Gillihan, Millard O. Lownsdale and R. Adalaide Lownsdale as their guardian, of the first part; and Hiram Smith, of the same place, of the second part, witnesseth: That the party of the first part hereby has agreed & by these presents does hereby lease unto the said party of the second part, for the term of four years from and after the first day of April next, all that tract of land, for farming purposes, contained within the following described boundaries to wit: i. e. beginning at a stake in the southern margin of Stark street, eight hundred feet westward, and with said line from Park street of record; thence running southward and parallel to Park street 19 ch. 69½
134 links, more or less, to a line with the center of Salmon street running from the Willamette River westward to a stake; thence westward and with the same bearing with Salmon street 30 c. 75 links to a stake in the proposed compromise line between the Portland claim & Amos N. King's claim, in 1852; thence northward and with the parallel to Park street twenty chains, more or less, to a stake in John H. Couch's south line and the northern line of the Portland claim; thence eastward and with said line 36.75 ch. twenty-nine $\frac{75}{100}$ chains, more or less, to the place where the southern line of Stark street cuts said line

at a stake; thence with the bearing of said Stark street one chain, more or less, to the place of beginning, containing about fifty acres, more or less, exclusive of the land occupied by the Portland and Plains road passing the Portland tannery, and also excluding the piece of ground sold heretofore in quitclaim to Hannah M. Smith; said road and said tract to the said Hannah M. Smith to be excluded from the operation of these presents.

The said Hiram Smith of the second part has paid one dollar in hand to the said Lownsdale, the receipt whereof is hereby acknowledged; and for the further consideration of facts hereafter to be performed, as described in these presents, on his part he agrees to put said tract
135 of land under a good and substantial rail fence, of the best timber on the premises described, to clear and put the same in good farm-like condition for cultivation, the said land to be fenced in at least two fields, leaving a lane where the road now runs or where it will not increase materially the distance of the road. It is further agreed by the parties that the said Hiram Smith shall be entitled to continue in possession of the above-described premises for the term of three years after the expiration of the aforesaid lease, as renter, at the specific rent of one-third of all the proceeds of said land, either in grain, grass, vegetables or pasturage, as the case may be, in and for the consideration of his farming the same or causing it so to be done in the best crops or pasturage suited to its quality of land, in a thrifty, farm-like manner. It is also agreed that the one-third of proceeds as the stipulated rents to be paid by the said Smith shall be paid by him to the said Lownsdale for the use of said lands semi-annually, i. e., on the 1st day of April and 1st day of October, out of the net proceeds after each crop shall be raised & harvested & ready for market or collection of pasturage or other proceeds or profits of said land, exclusive of its culture by the said Smith.

136 The said Smith also agrees, when the said term of four years' lease and the time of the three years' rent shall expire, and on the 1st day of April, A. D. eighteen hundred and sixty-seven, that he hereby binds himself to deliver the said premises up to the said Daniel H. Lownsdale, his executors or administrators, in peac'able possession, in good repair, for the use of him, the said Lownsdale, and the said minor heirs of his late wife aforesaid.

In testimony whereof we have hereunto set our hands and seals the date above written.

DANIEL H. LOWNSDALE, [SEAL.]
*For himself and minor heirs of his late wife.*
HIRAM SMITH. [SEAL.]

(In duplicate by the parties.)

(Original endorsed:) "Exhibit C."

137 UNITED STATES OF AMERICA,
*District of Oregon, ss:*

The President of the United States of America to the marshal of said district, or his deputy, greeting:

You are hereby required to summon W. B. Doblebower to be and appear before R. Wilcox, U. S. commissioner for the district of Oregon, forthwith, to testify on behalf of the defendant in a cause between J. R. Lamb et al. *as* I. A. Davenport, to appear at one o'clock this afternoon.

Witness the Hon. M. P. Deady, judge of said court, and the seal thereof, affixed on this 18th day of Jan'y, A. D. 1869.

R. WILCOX, *Clerk.*

DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have subpœn'ed the within-named W. B. Doblebower to be and appear as specified in the within writ.

AL. ZIEBER,
*U. S. Marshal.*
GEO. H. WEST,
*Deputy.*

138 U. S. circuit court, district *court.*

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

The depositions of J. P. O. Lownsdale, Hiram Smith, Orville Risley, & W. W. Page, taken and subscribed before R. Wilcox, commissioner of the U. S. circuit court, district of Oregon, by consent and agreement of the parties, on the days hereinafter mentioned, between the hours of 9 o'clock a. m. and 4 o'clock p. m. of said days, to be read in evidence on the hearing of the above-entitled cause; W. Lair Hill, esq., appearing for the complainants; W. W. Chapman, esq., for the defendant I. A. Davenport.

WEDNESDAY, *January 13th*, 1869.

J. P. O. LOWNSDALE being duly sworn, deposes and testifies as follows:

Int. 1st. Are you acquainted with block G in city of Portland?

Ans. I am.

2d. Who was in the possession of the S. ½ of it when you came back from the East the last time?

Ans. It was embraced in a tract of land of about 50 acres, being a portion of what is known as the Nancy Lownsdale tract, fenced and in the possession of Hiram Smith or those in his employ.

3d. When was that?

Ans. The time I refer to was in 1862, when I last returned.

139 4th. How long after that did it remain in the possession of Mr. Smith?

Ans. Up to or about the time that a partition was made by the Multnomah County circuit court in the suit of William Gillehan vs. S. N. Arrigoni et al., between the minor heirs of Nancy Lownsdale and others, which was, I think, about the year 1865.

5th. Was that the only suit of W'm Gillehan vs. S. N. Arrigoni et. al. with regard to that property?

Ans. I think it was the only suit in which W'm Gillehan was plaintiff.

(S'd) J. P. LOWNSDALE.

HIRAM SMITH, being duly sworn on the part of the complainants, deposes and testifies as follows:

Int. 1st. Look at this paper attached to the deposition of Isaac A.

Davenport, taken in this case, and marked Exhibit "C," and state what it is.

Ans. It purports to be a lease of land given to me by Dan'l H. Lownsdale in 1859.

2d. State whether or not you were present when this instrument was executed; and if so, by whom and when it was executed.

Ans. I was present when it was executed, and it was between
140 Dan'l H. Lownsdale and myself. It was executed the 18th day of October, 1859. I saw Daniel H. Lownsdale execute it.

3d. Do you know the S. ½ of block G, in the city of Portland?

Ans. Yes; it was included in the property described in that lease.

4th. State what, if any, improvements you made upon the property described in the lease?

Ans. I fenced it and took the most of the timber off; cleared up the most of it.

5th. When did you take possession of the property under that lease?

Ans. In October, 1859.

6th. How soon thereafter did you fence it in?

Ans. I fenced it that winter; the winter of '59 & 60.

7th. Was the S. ½ of block "G" included in the land you fenced up that time?

Ans. It was.

8th. How long did you remain in the possession of the S. ½ of block "G" after that time?

Ans. Until the division took place of the property among the heirs, in 1865 or '66.

9th. State what, if anything, you know of I. A. Davenport doing with regard to that land while you were in possession under that lease.

Ans. I think it was early in the spring, after warm weather, and the ground all fenced, one day in the spring, I think, of 1860, I discov-
141 ered that some one had let down the fence and hauled some 4 by 4 scantling in there, about 20 feet long, and they were put up as though to be a frame of a house—merely the sills of a house. I made enquiry of parties whom I do not now recollect and was told that Dr. Davenport was going to put a house there. I went over to Mr. Lownsdale and told him what I had been informed; he said he would go right down immediately & put a stop to it, as he had no business a building there. I saw him that afternoon or the next day, and he had stopped there being anything more done to it. It remained there 2 or 3 years, the sills did, and, I think, I hauled them away myself; I am not sure.

(Answer objected as hearsay & irrelevant.)

10th. State whether anything further was ever done towards building the house.

Ans. No.

11th. How much of the fence was pulled down at that time?

Ans. Just enough to go in and out; just a gap.

12th. State whether or not at any time, while you were in possession of that land, your fencing on the S. ½ of block "G" was ever pulled down by Dr. Davenport or by Hendee, except when the gap was opened for them to go in as you have stated.

142 Ans. I never knew it to be.

13. State whether or not during the time that you were in the possession of the S. ½ of block "G," you were ever notified or informed by Dr. Davenport or D. H. Hendee, that they, or either of them, claimed that ground or land.

Ans. I never was.

14. State whether or not you held possession as you have stated as tenant under that lease you have before described.

Ans. I did.

(S'd) HIRAM SMITH.

ORVILLE RISLY, being duly sworn on the part of the complainants, deposes and testifies as follows:

Int. 1st. State your age.

Ans. Sixty.

2. State whether you were recorder of the city of Portland, and justice of the peace in 1859 & '60.

Ans. I was justice of the peace in 1859 & '60; whether I was recorder or not, I do not recollect.

3. State whether or not you recollect an action before you in 1859 or 60, against D. H. Hendee for the possession of the S. ½ of block "G," in the city of Portland.

Ans. There was action of forcible entry & detainer tried, or trespass, before me, between Hendee & Isaac B. Smith, in reference to a
143 block of land in the Nancy Lownsdale claim; I do not remember the number of the block.

4th. Do you recollect who was the attorney for the plaintiff in the case?

Ans. No.

5th. Do you recollect whether a lease was exhibited there under which the plaintiff claimed?

Ans. I recollect that the pl'ff claimed possession by virtue of a lease from Dan'l H. Lownsdale, but I don't recollect whether the lease was exhibited or not.

6th. State whether or not Daniel H. Lownsdale or Isaac A. Davenport, or either of them, were present at that trial; and, if so, whether they were sworn as witnesses.

Ans. My best recollection is that Dan'l H. Lownsdale was present. I also think, but am not as certain of it, that Davenport was present. I have no recollection at all of Mr. Davenport being a witness. I think Mr. Lownsdale was.

7th. State if you recollect under whom Hendee claimed the right to the possession of the property.

Ans. I recollect that he claimed by purchase from some person. I do not recollect from whom.

8th. State whether there was a record of that case; and, if so,
144 in what book it was entered, and who has now the custody of that book.

Ans. There was a record of the case in my civil or criminal docket letter A or B. I turned my dockets over to my successor, Levi Anderson; that is all I know of their possession now.

(S'd) O. RISLEY.

THURSDAY, *January* 14*th*, 1869.

W. W. PAGE, being first duly sworn on the part of the complainants, deposes and testifies as follows:

Int. State your age and occupation.

Ans. Age 31; occupation, practicing lawyer.

2d. Do you recollect an action, about the spring of 1860, against D. H. Hendee, grantee of I. A. Davenport, b'ought at the instance of Smith, lessee of Dan'l H. Lownsdale, for himself and Mrs. Nancy Lowns-

dale's heirs, for the possession of, or trespass upon, the S. ½ of block G, in the city of Portland?

Ans. I recollect of prosecuting D. H. Hendee for trespass upon land which is now called the S. ½ of block G, at the instance of Dan'l H. Lownsdale and Mr. Smith, and am of the impression that it was I. B. Smith, brother of the lessee.

3d. State if you recollect before whom that action was prose-
145 cuted, and whether or not I. A. Davenport or D. H. Lownsdale, or either of them, was present at the trial, and whether D. H. Hendee was present.

(Objected to as incompetent and irrelevant.)

Ans. I know that D. H. Lounsdale & Mr. Hendee were present. I think that Dr. Davenport was; I am quite certain that he was, for the reason that on various occasions I have talked with him about that suit; he always claimed that Risley had done wrong.

4th. That Risley had done wrong in what?

Ans. In rendering judgment against Hendee in an action of trespass.

5th. State if you have seen the lease attached to the deposition of Davenport in this case, and whether or not that is the lease you referred to when you spoke of Hiram Smith being the lessee.

Ans. I have seen the lease attached to the deposition of Dr. Davenport a number of times. Hiram Smith is the person to whom I referred as being the lessee.

6th. You spoke of Hiram Smith being the lessee; did you see the lease under which he claimed to hold?

Ans. I did, and have seen it frequently, and this is the lease at-
146 tached to Dr. Davenport's deposition.

7th. State what, if anything, you know in regard to Hiram Smith's actual possession of the land called the S. ½ of block G.

Ans. Hiram Smith took possession of all the west half of the donation land claim of Nancy Lownsdale, extending from Salmon street to Washington, and from what is now called Tenth street westward to Amos N. King's donation claim, including the property in question. This was in the latter part of 1859 or early in 1860. He enclosed it with a worm rail fence, cut timber upon it, cultivated a portion of it, and held the exclusive possession of the same, under the lease referred to, continuously up to the spring of 1864 or 1865. On one occasion D. H. Hendee tore down a part of the fence. I think it was in 1860 or '61, and started to build a house on the property in question. He continued in possession for a few days, and until the termination of the suit referred to; with that exception, Smith had exclusive possession as lessee of Lownsdale and Mrs. Lownsdale's heirs, until I took possession as attorney for a portion of the heirs of Nancy Lownsdale.

8th. What do you know, if anything, in regard to the possession of the property in controversy from the time you took possession down to the present time?

147 Ans. For a year or more I exercised entire control over it, with the concurrence of the administrator of Lownsdale and other heirs of Nancy. The fences were then removed. The heirs of Nancy Lownsdale, up to the determination of the partition suit, wherein William Gillihan was pl'ff, exercised ownership over it. After the determination of said partition suit the administrator of Dan'l H. Lownsdale and his heirs, as far as it was possible to exercise control over unimproved land, have done so.

9. State if you know how the fencing came to be removed.

Ans. Hiram Smith or I. B. Smith hauled a portion of the rails away

so as to break the inclosure. Jacob Kamm used a portion in making what he termed a partition fence between land pretended to be owned by him and land owned by the heirs of Nancy Lownsdale; other of the rails were taken by persons unknown to me, and some were used by the tenants of the heirs of Nancy Lownsdale in fencing a portion of the land allotted to her or her heirs.

Cross-examination by W. W. Chapman:

148 Int. 1. Were any one of the occasions referred to by you in your answer to the 3d interrogatory, when you say you conversed with Dr. Davenport, on the occasion of that trial?

Ans. I think not. I do not recollect of having any conversation with Dr. Davenport on the occasion of that trial.

2. Have you a distinct recollection that at the time of any of the conversations referred to Dr. Davenport admitted that he was present at the time of that trial?

Ans. I cannot state that he ever told me that he was at that trial; my answer concerning his being there was based upon my recollection and from his familiarity with the trial, and the interest manifested by him when speaking concerning the result of it.

3. Have you not a recollection that Dr. Davenport, on some occasion, stated to you that he had conversed with Judge Risley about that trial, and about the decision he had made on it?

Ans. I do recollect that he did, on more than one occasion, state that he had conversed with Risley about the trial, and about his, Risley's, decision.

4. About what time did the S. ½ of block G cease to be enclosed?

149 Ans. I can't say positively; I think that it was in the latter part of the summer, or early in the fall of 1865.

5. What acts of ownership or possession do you know to have been exercised over the S. ½ of block G, after it ceased to be enclosed?

Ans. I know of the guardian of some of the heirs of Dan'l H. Lownsdale, as also the administrator, frequently examining the property in person, speaking of its value while on the land or in the neighborhood of it; understood from them that they had paid taxes upon it, examining it for the purpose of preventing any trespass upon it by any person; in short, doing whatever any one could do when property was not enclosed, except the making of fences or manuel improvements.

6. Do I understand you to say, and is it your meaning, that you were personally present with some of the heirs or their guardian upon the S. ½ of block G, on the occasions referred to?

Ans. You so understand me; that is my meaning.

Reëxamination by Hill:

Ques. 1. State whether or not the fence being broken when you was in possession for some of the heirs of Nancy Lownsdale, was so broken by your permission?

150 Ans. It was not by my consent, with my knowledge or permission; after it ceased to be an enclosure the rails that were used by tenants of the heirs of Nancy Lownsdale were used with my consent, and a portion of them at my request.

2. State whether or not the breaking of the fences was done by Dr. Davenport or his grantee.

Ans. I do not know, excepting this one occasion that I referred to.

(S'd) W. W. PAGE.

U. S. circuit court Oregon.

JOHN R. LAMB ET AL.
*vs.*
I. A. DAVENPORT ET AL. } In equity.

FRIDAY, *January 15th*, 1869.

Depositions continued by consent of parties.

W. W. CHAPMAN, being duly sworn on the part of the defendant, deposes and testifies as follows:

Int. 1st. Look upon the paper now shown you and marked Exhibit "A," and state what it is.

Ans. It is a copy of an original contract between D. H. Lownsdale, Stephen Coffin, and myself.

(Complainants object to the paper being used in evidence, because it is irrelevant, and no basis laid for using a copy instead of the original.)

2d. State if you know where the original is.

Ans. The original, of which this is a copy, was filed with the surveyor general of Oregon, in the Portland land case, and by the surveyor general transmitted to Washington.

151 3d. State what you know about the execution of the original to which you refer.

(Objected to as immaterial.)

Ans. It was executed by the three persons whose signatures appear to the copy, to wit: D. H. Lownsdale, S. Coffin, and myself, and was delivered to me; there were three original instruments, one was delivered to D. H. Lownsdale and one to Stephen Coffin. I have enquired of the administrator of D. H. Lownsdale if he knew anything of the instrument; he informed me that he did not, except that he had at some time seen it, or thought he had seen it, or a paper purporting to be the original, in the hands of S. Coffin or myself.

4th. Look upon the paper now shown you marked Exhibit "B," and state what it is.

Ans. It is a copy of an original deed executed by D. H. Lownsdale, Stephen Coffin, and myself. I was present, and all three of the persons mentioned executed the original in the presence of each other; the original was then delivered to myself.

(Objected.)

5th. State if you know where the original is.

(Objected to as immaterial.)

Ans. The original is in the General Land Office, in the city of Washington; I filed it some years ago, in the Portland land case, with
152 the surveyor general, at Oregon City, and with that case it was transmitted to Washington.

(Objected to introducing the instrument, because there is no basis for introducing copy, and because it is immaterial.)

6th. Are you acquainted with the S ½ of block "G," in the deed mentioned?

Ans. Yes.

7th. To whom did you sell that block, or any part of it?

(Objected to as imcompetent, and because not the best evidence.)

Ans. For some years, without a very close examination of the subject, I had supposed that I had sold the entire block to W. B. Doblebower; but since there has been controversy about it, and I have read the deposition of Doblebower, and given the subject more thought, I am satisfied

hat I sold the whole block to a man by the name of Johnson, and I have no doubt, at his instance, I made a deed for the north half of the block to Doblebower, and I believe I made a deed to Johnson for the S. ½ of block G. I think the initials were A. S. My reason for believing that I executed a deed, are that ever since I sold the property, I have had no doubt of having conveyed it. I knew that I had sold it, but for some time had forgotten Johnson as a party connected with it.

8th. State if you know anything of the whereabouts of Johnson.

(Objected to as immaterial.)

153 I have known nothing of him since about the year 1853 or '54, and it might have been longer. I heard that he had gone to the States.

(Latter part of answer objected to as hearsay.)

9th. State whether you have any recollection of executing a deed to Johnson for that property?

Ans. I have no recollection of the particular circumstance, either of that or the one to Doblebower; but ever since the transaction I have *rest* satisfied that I had conveyed both halves of the block, and I have no doubt, after reading Doblebower's deposition, as before stated, that I made a deed to Johnson for the other half.

10th. State what you know about the possession of that block.

(Objected to as immaterial & irrelevant, there being no allegation of possession in the answer.)

Ans. Up to the execution of the deed of the 25th of June, of which Exhibit "B" is a copy, Lownsdale, Coffin, & myself were possessed of that block, in pursuance of the agreement of 13th December, '49. (See Exhibit "A.") From that time until I sold it, I considered myself in the possession of it exclusively. It being unoccupied land, the deeds were considered as a delivery of possession. I do not remember whether

154 I ever took Johnson or Doblebower on to the land, though I might have done so; as to any other person being in the possession until recently, I have no knowledge.

(That portion of the answer which says that the deeds were considered possession, objected to as incompetent.)

Cross-examination by W. Lair Hill:

Int. 1st. Do you say that Exhibit A was executed in triplicate?

Ans. I do.

2d. What was done with the other two originals beside the one delivered to you?

Ans. One was delivered to Stephen Coffin, the other to Dan'l H. Lownsdale.

3d. Did the administrator of Lownsdale, when asked if he knew anything of the originals, tell you he had seen what purported to be an original, or that he had seen what was so claimed by the person in whose possession it was?

Ans. Substantially both, as I understood him; finally that they claimed it to be an original, but that he did not know whether it was or not. I do not propose to give his precise language.

4th. Did he not tell you, in that conversation, that he did not know whether the instrument itself purported to be an original or not,

155 but that he only knew that the person who had it in possession claimed it to be such?

Ans. I have substantially answered the question, both as I first understood him, and in the affirmation of the question, and I now answer in the affirmative, that he finally so stated.

5th. How long since that conversation took place?

Ans. About the commencement of this deposition.

6th. In whose hands did he say that instrument was?

Ans. In the hands of either Coffin or myself, he thinks.

7th. Who gave that instrument, the original of Exhibit "A," to the surveyor general of Oregon, and when and where?

Ans. What particular person delivered it to him I do not remember, nor the particular place. It has been a great while since that land suit was made up, and I have always had the impression, without doubt, that it was there, and filed there by one of the parties, Lownsdale or myself, and I have been confirmed in that impression from having taken a copy and endorsed upon it, in my own handwriting, that the original was at Washington.

8th. Have you any recollection of seeing it placed in the hands of the surveyor general?

Ans. I have not; but if I can have a few moments to refer to a memorandum or paper in my office, I think I can answer the question more satisfactorily.

156 9th. When, where, and under what circumstances did you make the copy marked Exhibit "A?"

Ans. I cannot now state. I know from the paper and the writing, and my recollection of the instrument that I made it from one of the original papers.

10th. Have you any recollection of the fact of making it, or any means of knowing that you did make it, except the fact that you have the copy and endorsement thereon before you in your own handwriting?

Ans. I know that I had one of the originals. I know that I have not got it now. I know that I must have taken that copy from the original. I am satisfied, from the face of the copy, from the care taken in making it, that I have preserved it, for the reason that the original was filed in one of the land suits, and I think before the surveyor general; but of the precise fact, place, and time, and circumstances of making it, I have no recollection.

11th. Was this copy made before or after the original was filed in the land suit?

Ans. I could not state.

12th. Was it made at Washington?

Ans. It was not.

13th. When was the paper marked Exhibit B made?

Ans. I have no recollection of the time or circumstances of making this copy.

157 14th. How do you know it to be a copy of an original deed?

Ans. I have had it for a good while; know from its face and the care that I have taken in preserving it, that I must have made it from the original. I remember having placed the original in the surveyor general's office at Oregon City. I could not have made this copy from recollection, and I see a commencement of a certificate at the bottom in my own handwriting, which I am satisfied, from an inspection, was designed for the surveyor general to certify. And I think I must have drawn this from the original then on file in the office, although I do not now recollect the circumstance; but I do remember one fact in connection with obtaining a copy, that is, of going to the surveyor general's office and writing upon that subject myself, and presume that I must have then completed this whole deed just as it appears.

15th. As you state that you could not have made that copy from memory, was it not physically possible for you to have made the paper

marked Exhibit B without either having the original before you or having any memory of an original like it?

Ans. It was possible to have made it from some other copy if
158 there was one at the time; but I know of no reason for making it from a copy, if there was one.

16th. About what year did you have the transaction with Johnson referred to by you in your direct examination?

Ans. I am not now able to state. I think it must have been in 1850 or '51.

17th. Are you sure it was not as late as 1852?

Ans. I am not sure; but I think it was before that.

18th. In your answer to direct interrogatory No. 10 you stated that you knew nothing as to who held possession of the S. ½ of block G, after the transaction between you and Johnson until recently; how recently?

Ans. I saw the fence referred to in the depositions made by Smith. Since that fence was taken away I have seen no possession visible, except that of Field's, on the N. ½.

19th. Whom have you known to be in possession recently?

Ans. There has been no visible possession to my knowledge, except the possession occasioned by that fence. I supposed that Davenport, after the decree, was in possession; but I did not know anything as to what was doing on the outside.

20th. You say that you never had any doubt, after the transaction with Johnson, of your having sold the S. ½ of block G?

159 Ans. I never had any doubt after about the time of conveying to Doblebower but that I had sold the whole block, and for some time my impressions were that was to Doblebower; but I more recently became satisfied, as before stated, that the original transaction was with Johnson, and at his instance I conveyed the N. ½ to Doblebower.

21st. Did you not state, under oath, on your examination in the suit entitled Stephen Coffin, pl'ff, vs. J. P. O. Lownsdale, administrator, et al., def'ts, commonly called The Listing Case, on the 18th day of April, 1864, before the clerk of the circuit court of the State of Oregon for Multnomah County, that you held block G at the time of a meeting referred to by you between Coffin, Lownsdale, & yourself, shortly after the 10th of March, 1852, and that you then listed block G back to D. H. Lownsdale as part of the settlement among you in regard to the Portland land claim?

Ans. I do not remember what I stated then; but if I had the deposition I could tell what I stated. If the copy which has been shown to me is correct, I stated that I held quite a number of blocks in the part of the land claim assigned to Mrs. Lownsdale, and among them block G, two acres.

22d. Did "block G, two acres," include the S. ½ of block G,
160 now in controversy?

Ans. It did. In explanation of what I stated on the trial referred to, *that* my present impression is that in making a list of what property was held, that all the property was named in that list, whether disposed of or not, and my present recollection is, that there were several lots or blocks, though without a particular examination of the deposition or papers I could not specify.

23d. Did you not state in that deposition that where property had been sold by one party or the other that other property was substituted for that in the listing, so as to make the division more nearly equal?

Ans. I cannot tell from recollection what I then stated; it has been a long time since, and the particulars of that listing I do not now re-

member without reference to papers and memorandums which I have not now before me.

24th. Do you not know that the object of the proof with regard to the listing case was to show what property had passed to the benefit of Lownsdale, in pursuance of the listing, and that the S. ½ of block G was among the property which you swore had passed to the benefit of Lownsdale? And do you not know that the object of ascertaining that fact was to enable the court to determine what amount of land
161 should be decreed from the estate of Lownsdale to Coffin, in lieu of the land so received by Lownsdale?

(Objected to as immaterial.)

Ans. I do not know specially the object of the proof in any particular instance. The object of my testimony seemed to be to show what took place in reference to that listing; the deposition will show itself what I said. If my attention is called to any particular part of it or words used by me, I will answer it; but I cannot at this day state the object, except from the deposition. I was not familiar with the suit, except as I was acquainted with the original transactions, and I do not remember now that I had anything to do with the suit.

Direct examination resumed:

Ques. 1. State whether, since your examination in reference to Exhibit A, you have examined any papers or in any manner satisfied yourself in reference to the original document?

Ans. I have made enquiries in reference to the original, and I am satisfied that it was filed in the General Land Office, and I am further satisfied, that within the last, perhaps, ten years, it has been returned to Portland; but I have not yet learned whether it has been returned to Washington or not, and I am not able to say whether the one
162 that went to Washington was my own; but mine is gone, and I think it must have been mine that was filed.

(S'd) W. W. CHAPMAN.

W. W. PAGE being reëxamined, deposes & says:

1. Look at Exhibit X, and state whether or not you have compared it with the original patent issued by the United States; & if so, whether it is a copy of that original.

Ans. I caused this to be copied by Rob't E. Bigbee, then in my office, compared it myself with the original, and at the time of comparing endorsed on the back of it the words, "United States of America to D. H. Lownsdale et al.," and the same is a copy of the original patent then in my possession.

(S'd) W. W. PAGE.

163 *Stephen Coffin, D. H. Lounsdale, and W. W. Chapman to William W. Chapman.—Copy of deed.*

This indenture, made and entered into this 25th day of June, A. D. 1850, between Stephen Coffin, Daniel H. Lownsdale, and William W. Chapman, proprietors, of Portland, Washington County, Oregon, of the one part, and William W. Chapman aforesaid of the other, witnesseth:

That the party of the first part for and in consideration of the sum of sixty thousand dollars, lawful money of the United States, to them in hand paid, the receipt whereof is hereby acknowledged, doth release, confirm, and quitclaim unto the said William W. Chapman, his heirs and assigns, forever, all the following-described town property, situated

in the town of Portland, Washington County, Oregon, to wit: Block No. 167; block No. 173; block No. 165; block No. 175; block No. 160; block No. 185; block No. 184; block No. 178; block No. 186; block No. 176; block No. 193; block No. 194; block No. 210; block No. 212; block No. 202; block No. 198; block No. 200; block No. 219; block No. 217; block No. 215; block No. 228; block No. 230; block No. 251; block No. 250; block No. 252; block No. 237; block No. 238; block No. 254; *block No.* 254; block No. 262; block No. 260;
163½ block No. 258; block No. 257; block No. 267; lots No. 3, 4, 5, 6, in block No. 243; lots Nos. 3, 4, 5, 6, in block No. 253, and lots Nos. 1, 7, 8, in block No. 208, and the west half of block No. 157; lots Nos. 1, 2, in block No. 112; lots No. 3, 5, 8, in block No. 115, and 3, 5, 8, in block 116; also, blocks entire No. 103; block No. 106; block 109; block 118; block No. 121; block No. 127; block No. 124; block No. 130; block No. 135; block No. 137; block No. 146; block No. 143; block No. 139; block No. 149; block No. 152, and the south half of block No. 155, each whole block containing eight lots, each lot fifty feet wide by one hundred feet long. Also, out-lots, marked upon the plat of said town D, G, O, K, J, T, S, Y: To have and to hold the said property to the said William W. Chapman, his heirs and assigns, forever; and the party of the first part covenants to and with the said William W. Chapman, his heirs and assigns, that the property aforesaid unto the said Chapman, his heirs and assigns, will warrant and defend against all claims, the United States excepted; and the party of the first part further covenants that if they obtain the fee-simple to said property from the Government of the United States, they will convey the same to the said William W. Chapman, his heirs or assigns, by deed of general warranty. Lots 1, 2, in block 175; 1, 2, in 176; N. 1, 254; No. 1, 2, in block 173; No. 1, 2, in 165, are sold.

In testimony whereof the parties of the first part have here-
164 unto set their hand and seals the day and year aforesaid.

(Signed) S. COFFIN. [SEAL.]
(Signed) D. H. LOWNSDALE. [SEAL.]
(Signed) W. W. CHAPMAN. [SEAL.]

Signed, sealed, and delivered in presence of—

TERRITORY OF OREGON, *Washington County, ss:*

Be it remembered that on this 25th day of June, A. D. 1850, personally appeared before me, notary public in and for said county, the above-named Stephen Coffin, D. H. Lownsdale, and William W. Chapman, the identical persons whose signatures appears to the foregoing deeds, and acknowledged the same to be freely and voluntarily done by them, and desired that the same may be certified. Given under my hand and seal the day and year aforesaid.

(Signed) W'M M. KING. [SEAL.]

I hereby certify the foregoing to be a true copy from the original on file, as testimony in the case of the Portland land claim.

Original endorsed "Exhibit B."

165 *D. H. Lownsdale and Stephen Coffin to William W. Chapman.—Copy of articles of agreement.*

Articles of agreement between D. H. Lownsdale and Stephen Coffin,

of the first part, and William W. Chapman, of the second part, witnesseth:

That whereas the said Lownsdale and Coffin are joint owners of the town of Portland and the claim upon which said town is situate—the said claim being recorded and held in the name of said Lownsdale and Coffin—for and in consideration of the sum of twenty-six thousand six hundred and sixty-six dollars, to be paid as hereinafter mentioned, doth bargain, sell, and quitclaim unto the said Chapman an undivided one-third part of said claim, town lots, & improvements, saving the recording of said claim by said Lownsdale. The said Coffin, Lownsdale, and Chapman are to be equal partners in the above-described property, excepting town lots already sold previous to this date as town property, the payments for which are to be as follows: Three thousand three hundred and thirty-three dollars in hand; the remainder in four equal payments of six, twelve, eighteen, and twenty-four months, in equal proportions, to said Coffin and Lownsdale, each, as per notes of this
166 date. The said Coffin and Lownsdale are to occupy the house and four lots, at a rent of five hundred and seventy-five dollars, for one year, subject to other arrangements thereafter. The four lots and orchard north of the house to be used jointly, as it may suit. In all matters pertaining to the partnership the legal advice and counsel is to be free of charge on the part of said Chapman. A book and plat of said town shall be kept at Portland by the parties, and regular entries made in said book of sales, receipts, and expenditures. The parties shall make mutual arrangements from time to time for the proper use of the funds. The parties shall take such steps for obtaining title from Government as they may mutually agree upon.

In testimony whereof the parties aforesaid have hereunto set our hands and seals in triplicate this 13th day of Dec'r, 1849.

| | | |
|---|---|---|
| (Signed) | S. COFFIN. | [SEAL.] |
| " | D. H. LOWNSDALE. | [SEAL.] |
| " | W. W. CHAPMAN. | [SEAL.] |

(Original endorsed:) Exhibit "A."

167 *Copy of patent to D. H. & Nancy Lownsdale.*

The United States of America to all to whom these presents shall come greeting:

Whereas there has been deposited in the General Land Office of the United States, a certificate numbered one thousand and twenty-two, of the register and receiver at Oregon City, Oregon, whereby it appears that under the provisions of the act of Congress approved the 27th day of September, 1850, entitled "An act to create the office of surveyor general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," the claim of Daniel H. Lownsdale and Nancy Lownsdale, of Multnomah County, Oregon, notification No. 88, has been established, to a donation of one section, or six hundred & forty acres of land, and that the same has been surveyed and designated as claim No. 40, being parts of sections thirty-three and thirty-four in township one north, range one east, and claim No. 66, being parts of section three and four in township one south, range one east, according to the official plat of survey returned to the General Land Office by the survey general, being bounded and
168 described as follows, to wit: beginning at a point on the west bank of the Willamette River, thirty-seven links south 4 degrees

west, from the intersection of the base line with said west bank of Willamette River; thence north seventy degrees and fifteen minutes west fifty-two chains and eighty-nine links; thence north eighty-nine degrees west twenty-three chains and twenty-nine links; thence south twenty degrees and fifteen minutes west fourteen chains and forty-five links; thence south sixty degrees and forty-five minutes east fifty-eight chains and ninety links; thence south twenty degrees and forty-five minutes west seven chains and forty links; thence south sixty-nine degrees and fifteen east seventeen chains and ninety-four links to the Willamette River; thence with the meanders of said river, down stream, north sixteen degrees and forty-five minutes east thirty-one chains and twenty-three links to the place of beginning; in the district of lands subject to sale at Oregon City, Oregon, containing one hundred and seventy-eight acres and nine-hundreths of an acre.

And whereas it appears that a portion of this claim is covered by an entry made on the first day of February, 1858, by the corporate authori-
169 ties of the city of Portland, which entry has been approved and patented to the said corporate authorities, in trust for the several use and benefit of the occupants thereof according to their respective interests:

Now know ye that the United States of America, in consideration of the premises, and in conformity with the provisions of the act aforesaid, have given and granted, and by these presents do give and grant unto the said Daniel H. Lownsdale the east half, and unto his wife, Nancy Lownsdale, the west half of the tract of land above described, subject to such rights as may exist in virtue of the aforesaid entry for the city of Portland: To have and to hold the said tract, with the appurtenances, unto the said Daniel H. Lownsdale and his wife, Nancy Lownsdale, and to their heirs and assigns forever, their respective portion as aforesaid, subject as aforesaid to said entry for the city of Portland. In testimony whereof I, Andrew Johnson, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereto affixed.

Given under my hand at the city of Washington, this sixth day of June, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

By the President:

ANDREW JOHNSON,

By

*Secretary.*

170 Recorded vol. 2, page 37, by—

MARTIN BUEL,

*Acting Recorder of the General Land Office, ad interim.*

(Original endorsed:) Exhibit "X."

*Deposition of W'm B. Doblebower.*

JANUARY 18TH, 1869.

W'M B. DOBLEBOWER, being duly sworn on the part of the defendant, deposes and testifies as follows:

Int. 1st. Are you the person named in a deed from Doblebower to Fields?

Ans. Yes.

2d. Where did you reside in the years 1850, '51, and '52?

Ans. Most of the time in Portland.

3d. Were you in either of these years acquainted with a man named Johnson, a carpenter?

Ans. Yes; there was two of them, brothers. I don't recollect their first names.

4th. Was you acquainted with block G in the city of Portland?

Ans. Yes.

5th. State what you know of any person or persons having
171 purchased that block of W. W. Chapman, or any part of it.

(Objected to as incompetent, and because it is not confined to the S. ½ of the block.)

Ans. In the first place, I bought the N. ½ of the block from a man by the name of Johnson. He said he had bought the whole block from Mr. Chapman. Johnson hired me to work for him, for which I was to take part of block G.

(Objected to as not being responsive to the question and to that part as to what Johnson said as being hearsay.)

6th. State whether Johnson made you a deed to the N. ½ of block G, or who did.

(Objected to as incompetent & immaterial.)

Ans. He did not make me a deed. The agreement was, that Mr. Chapman was to make it.

7th. State how Chapman came to make you a deed.

(Objected to as the last.)

Ans. Most of the work I done for the property was done on Mr. Chapman's property.

8. State, if you can, how Chapman was induced to convey the block to you. Did the parties together say anything upon the subject; and, if they did, what was it?

(Objected as leading, immaterial, & incompetent, and because the witness has not stated that Chapman had ever made him a deed to the block.)

172 Ans. I don't recollect of their ever being together when they spoke about it. Johnson told me that the deed would come in that way, and it did come in that way.

9th. State whether you ever saw Johnson on the S. ½ of block G, and what he said, if anything.

(Objected to as immaterial.)

Ans. I can't say whether he was on the S. ½ or not. He took me there, and showed me the property. I don't know whether it was the S. ½ or not. I could not tell.

10th. Was he then claiming the other ½ of the block from that he sold you?

(Objected to as incompetent.)

Ans. He said he owned it all, or was to get it all.

11th. State, if you know, where Johnson is.

Ans. I don't; I hav'n't seen him for a number of years.

12th. Who handed to you the deed that you received?

(Objected to as immaterial.)

Ans. I don't recollect who.

13th. What year was it that property was purchased?

Ans. I can't recollect. The deed will show. I think it was in the winter of 1850 & '51.

Cross-examined by Hill:

Ques. 1. Which half of the block was it that you purchased?

Ans. The N. ½, I think; the deed shows.

173 2. Was it the property you purchased that Johnson showed you?

Ans. I thought so. It was in the woods. I bought the piece he showed me, or intended to.

3d. It was understood between you and him, at that time, that it was to be the N. ½ of block G, was it?

Ans. Yes.

4th. Johnson said at that time that he was to get the whole block, did he?

Ans. He said he was to get the whole block at the time he showed it to me.

5th. That was before you bought, was it?

Ans. Yes, before I bought.

6. And before you did the work for him?

Ans. I don't know whether I had done anything for him or not before I bought.

7th. If you had done any for that ½ block, had you done all?

Ans. No. I worked afterwards.

8. The work you done for Johnson was upon one or more jobs that he was doing for Chapman, was it not?

Ans. Some of the work was, and some was not.

(S'd) W'M B. DOBLEBOWER.

174 STEPHEN COFFIN, being duly sworn on the part of the defendant, deposes and testifies as follows:

Int. 1st. State whether you, some time in December, 1849, entered into a contract with D. H. Lownsdale & W. W. Chapman in reference to the Portland land claim.

Ans. Yes, sir.

2d. State the date as near as you can, and how it was executed.

(Objected to as not the best evidence.)

Ans. My impression is that it was dated the 13th of December, 1849; signed by W. W. Chapman, D. H. Lownsdale, and myself; signed in triplicate.

3d. To whom were those instruments delivered?

Ans. One to each party.

4th. State what became of your copy—where it is, if you know.

Ans. I don't know certain whether I had it filed in the land office or not. I examined some of my papers to-day, & could not find it. I don't know certain where it is.

5th. How lately, to your knowledge, have you seen it?

Ans. I have seen that agreement, or a mate to it, one or the
175 other, within the last year. I don't know positive whether it was the one I kept, or the one delivered to Col. Chapman.

6th. State in whose possession you last saw it.

Ans. The paper that I have seen within the last year was in Col. Chapman's office, but don't know positive whether it was my copy or his. It was in the hands of Col. Chapman when I saw it last.

7th. Do you know anything of the whereabouts of either of the other copies at the present time?

Ans. I do not further than I have stated.

8th. Look at Exhibit "A" shown you, and state whether you may or may not have taken it for one of the triplicates referred to by you.

Ans. My former answer has reference to the original. I think not.

(S'd) S. COFFIN.

W. W. CHAPMAN being called—

(W. Lair Hill, of counsel for complainants, objects to the recalling & examination of W. W. Chapman in any matter in which he has testified before or anything in connection therewith.)

Int. 1st. State whether you heard the deposition of Stephen Coffin taken this day; and if so, state whether you now know anything of the instrument referred to by him as having been in your possession.

176 (Objected to as leading and irrelevant.)

Ans. I have heard Mr. Coffin's deposition, and I remember no more of the instrument than I have before stated. It is possible I may have had one, but what one or what I done with it I do not remember. I have made search for one where I supposed it would be if I had it, and have not been able to learn anything of it.

(S'd) W. W. CHAPMAN.

By agreement of the parties the testimony in this cause is now closed January 18th, 1869.

R. WILCOX,
*U. S. Commissioner.*

DISTRICT OF OREGON, *ss:*

I, R. Wilcox, commissioner of the United States circuit court for the State of Oregon, hereby certify that the foregoing depositions were taken before me at my office, in the city of Portland, in said district on the days and between the hours mentioned, and reduced to writing by myself; that before examination the witnesses were severally duly sworn to tell the truth, the whole truth, and nothing but the truth; the depositions were read to the witnesses respectively, and there-

177 upon subscribed by them.

Witness my hand this 18th January, 1869.

R. WILCOX,
*U. S. Commissioner.*

(Copy.)

*Decree of circuit court.*

MULTNOMAH COUNTY, OREGON:

Be it remembered that at a special term of the circuit court of the State of Oregon, in and for the county of Multnomah, begun and held at the court-house, in the city of Portland, in said county, on Monday, the 27th day of March, A. D. 1865, in pursuance of an order of said court, made March 4, 1865, and on Monday, May twenty-second, 1865, being the sixth judicial day of said special term—Hon. Erasmus D. Shattuck, judge—the following among other proceedings were had:

MARTIN GILLIHAN, GUARDIAN OF WILLIAM Gillihan,
*vs.*
S. N. ARRIGONI, H. W. CORBETT ET AL.

At this day comes the parties by their respective att'ys, as heretofore, and the court having heard counsel upon the exceptions to the

178 report of the referees heretofore appointed to appraise the property in dispute, for the information of the court, overrules said exceptions; to which ruling of the court the defendants, filing objections, except. And it appearing to the court from the pleadings & proofs, and

the report of the referees aforesaid, that the land claim in controversy cannot be partitioned equally between the heirs and representatives of Nancy Lownsdale, deceased, without prejudice to the rights and interests of those claiming under Daniel H. Lownsdale, and that Daniel H. Lownsdale in his life-time, as heir of the said Nancy Lownsdale, and as the vendee of Isabella Ellen Potter, another heir of said Nancy, was entitled to two-fifths of all the land in controversy, and the plaintiff, William Gillihan, to one-fifth, and Ruth A. Lownsdale and Millard O. Lownsdale to one-fifth each, as heirs of said Nancy: It is, therefore, adjudged and decreed by the court that the said tract of land described in the complaint as the land claim of said Nancy Lownsdale, & heretofore appraised by the referees, be partitioned and allotted to the respective representatives of the said Nancy in manner following, that is to say: That the tract described as Park avenue being a piece one hundred and forty feet wide, and extending across
179 the entire claim; the parcel designated as the north half of block No. 253, being two hundred and eighty feet long and one hundred and thirty feet wide, and the whole of said land claim lying west of parcels designated "G," "H," & "J" be, and the same are, assigned to Ruth A. , Millard O. Lownsdale & William Gillihan, minor heirs of Nancy Lownsdale, and that said parcels be partitioned equally between said Ruth A. Lownsdale, Millard O. Lowndale, & William Gillihan, and al'otted to them in equal portions, quality and quantity relatively considered, one-third in value to be awarded to each, and that all the residue of said land claim be assigned to the representatives of Daniel H. Lownsdale, claiming as heirs or vendees. And it appearing that compensation is due from the representatives of Daniel H. Lownsdale to the three minor children above named, on account of the inequality of partition, and that some of the parcels designated on the maps, exhibited by members, have been subdivided, and are claimed by the respective defendants in severalty: It is further ordered that the amount of compensation justly due from all the claimants under Daniel H. Lownsdale be estimated and ascertained, and such total amount be equitably distributed and apportioned among the several lots & subdivisions so claimed by the defendants respectively. It is further ordered that H. C. Leonard, J. C. Ainsworth, & George H. Bel-
180 den, esqrs., the referees heretofore appointed in this cause, be and they are, appointed referees to make final partition and estimate of compensation under this decree, and the said referees, after being sworn, are directed to divide the property, above assigned to said Ruth A. , Millard O. Lownsdale and William Gillihan, equally between them, and to allot to each his or her several portion thereof, quantity and quality relatively considered, designating the several portions by proper landmarks—making or causing to be made all necessary surveys. And the said referees are directed to report their proceedings, specifying the manner of executing their trust, and describing the property allotted to each party. It is further ordered that said referees estimate and determine the amount of compensation herein provided for, and report in detail the amount that should be justly charged upon all the property assigned to the representatives of Daniel H. Lownsdale, and the amount chargeable upon the several parcels occupied by the defendants, stating the ratio of such amount to the whole value of the parcel upon which it is charged, and that this estimate be made upon view, and upon the principles specified in the former decree, under which report has been filed, the former appraisement, however, not be binding if the referees see cause to change the

same. The referees are further directed to decide all questions of value upon view, and upon the pleadings & proofs filed in this cause, and report herein within thirty days if practicable. The defendants, represented by W. W. Chapman, att'y, excepted to this
181 decree, and to that part especially which confines the referees to a view and to the papers in this case, and excludes further testimony and a hearing of the parties before the referees. The other defendants except generally, and all have leave to file specifications.

(Signed) ERASMUS D. SHATTUCK,
*Judge.*

And, furthermore, be it remembered that at a special term of the circuit court aforesaid, begun and held at the court-house, in the city of Portland, aforesaid, and Tuesday, the first day of August, A. D. 1865, being the time fixed by the Honorable Erasmus D. Shattuck, sole judge of said court for holding a special term thereof, the following, among other proceedings were had, and Saturday, August 12th, 1865, being the sixth judicial day of said special term.

WILLIAM GILLIHAN, BY HIS GUARDIAN, Martin Gillihan, plaintiff,
*vs.*
S. N. ARRIGONI, A. ABBOTT, LOYD BROOK & wife, D. S. Baker, O. D. Buck & wife, Joseph Bergman, Isaac Bergman, John Blanchard, guardian James Burk, Peter Burk, H. W. Corbett, Mary E. Cooper, William E. Cooper, Stephen Coffin, C. O. Clark, Stephen Coffin, administrator Hill est.; Stephen Coffin, guardian Hill heirs; S. Coffin, guardian Lucinda Coffin; W. W. & M. F. Chapman, William Cree, adm'r Thompson's estate; F. M. Dewitt, Chas. Dolson & wife; Isaac A. Davenport, M. P. Deady, Estes & Stimson, E. W. Fine, James Fields, A. C. Gibbs, O. B. Gib-
182 son & wife, Ira Goodenough, Jacob Gozette, Clark Hay, James B. Harker & wife, Alex. Hamilton, Christiana Hamilton, John Hulery & wife, Charles Hill, Frank & Clara Hill, John Kennith, Kelly & Wait, J. P. O. Lownsdale, Ruth A. Lownsdale, Millard O. Lownsdale, Alonzo Leland, Walter Moffitt, Joseph McHenry, Edward T. Mears, Shubric Norris, J. L. Nickum & wife, Michael O'Conor, W. & J. E. Potter, City of Portland, Henry L. Pitlock, Sylvester Pennoyer & wife, W. S. Powell & wife, Vincent Rand & wife, Jacob S. Risley, Orville Risley, Emma & Ida Squires, Samuel Scott, School District No. 1, Thomas F. Scott, A. M. & L. M. Starr, Lansing Stout, Isaac B. Smith, Hiram Smith, Hannah M. Smith, George H. Triboo, George & Mary Taylor, George W. Walling, F. M. Warren & wife, Charles & Mary Warren, defendants.

This cause having been heard upon the exceptions to the report of

the referees heretofore filed, the respective parties appearing by their attorneys as heretofore, and the court having heard further proof and the argument of counsel respecting the compensation justly due to the heirs of Nancy Lownsdale on account of inequality of partition, and duly considered the matter, finds that said report should be in part set aside and modified; that is to say in this, the compensation allowed to the heirs aforesaid, should be reduced ten per cent. upon the legal-tender estimate reported, and instead of the sum of forty-three thou-
183 sand five hundred and six & $\frac{68}{100}$ dollars as fixed by said referees, there should be only thirty-nine thousand and one hundred and fifty-six & $\frac{02}{100}$ dollars in United States legal-tender notes, which last-named sum is all owed for compensation as aforesaid, and a like deduction of ten per cent. is also ordered and made in the amounts apportioned to the respective lots and parcels of land claimed by the defendants, and said report, with the amounts estimated in legal-tender notes so reduced, in this and all other respects ought to be, and is hereby, confirmed. It is therefore ordered, adjudged, and decreed that the partition made by said referees be effectual, firm, and binding and conclusive, except as in this decree provided; that is to say, that there be, and is, allotted and assigned to Millard O. Lownsdale, as one of the heirs of Nancy Lownsdale, all that part of Park avenue south of the center of the extension of Yamhill street, and extending to the south line of the tract described in the complaint as Nancy Lownsdale's donation claim, and between the center lines of East and West Park streets, according to the plat filed with the pleadings. Also all of the parcels of land descri bed and designated on the said plat as blocks "K" & "L," and the north forty-five (45) feet of lot one (1) in block two hundred and fifty-three, (253.) To Ruth A.
184 Lownsdale, that part of Park avenue north of the center line of Washington street, and between the center lines of East and West Park streets to the south line of Benjamin Stark's claim, and that part of Park avenue lying between the center lines of Alder and Morrison streets, and the center lines of East & West Park streets; also all of those parcels of land described and designated on said plat as block "S" and block No. one, (1;) all of lots seven (7) and eight (8) in block No. two hundred and fifty-three, (253,) and that part of the lot containing $2\frac{7}{100}$ acres lying south of the center of Yamhill street extended, and lying west of block No. one, (1.) To William Gillihan, that part of Park avenue between the centers of Washington and Alder streets and the centers of East and West Park streets, and that part of Park avenue lying between the centers of Morrison and Yamhill streets and centers of East & West Park streets; also all of block "T," all of block No. two, (2,) all of lot No. two, (2,) and five feet of south side of lot No. one (1) in block No. two hundred and fifty-three, (253;) all that part of lot containing $2\frac{1}{100}$ acres north of the center line of Yamhill street, and all north of parcels T and No. two, (2.) To the heirs and vendees or claimants under Daniel H. Lownsdale, according to their respective interests, all of said tract not above mentioned and
185 allotted to the said Millard O., Ruth A., and William, heirs of said Nancy; and it appearing that said partition is unequal, and that the said heirs of Nancy Lownsdale are entitled to compensation, which has been assessed as aforesaid, it is ordered, adjudged, and decreed that the said Millard O., Ruth A., & William do jointly have a lien upon said tract and parcels of land alotted to those claiming under said Daniel A. Lownsdale as aforesaid, for the said amount of compensation, to wit, the sum of thirty-nine thousand one hundred and fifty-

six & $\frac{02}{100}$ dollars ($39,156 02) in United States legal-tender notes, and that said sum be, and it is, apportioned among the several parcels claimed by the defendants, and is charged upon the respective lots or parcels, as follows, to wit:

| | | |
|---|---|---|
| Block 209, lots 1, 2. | Otella, wife of Francis De Witt, (fractional) one hundred & twenty-three $\frac{23}{100}$ dollars..... | $123 23 |
| " 209, " 3 & 4. | Walter Moffett, (fractional) one hundred & nine & $\frac{54}{100}$ dollars..... | 109 54 |
| " 209, " 5 & 6. | G. W. Walling, the sum of four hundred and fifty-eight $\frac{67}{100}$ dollars .. | 458 67 |
| " 209, " 7. | Samuel Scott, the sum of two hundred & fifteen & $\frac{63}{100}$ dollars.... | 215 63 |
| " 209, " 8. | C. Hay & others, the sum of two hundred & forty-three & $\frac{01}{100}$ dollars ..... | 243 01 |
| " 210, " 1, 2, 7, & 8. | H. W. Corbett, the sum of six hundred & two & $\frac{42}{100}$ dollars..... | 602 42 |
| " 210, " 3, 4, 5, & 6. | Addison C. Gibbs, the sum of six hundred & two & $\frac{42}{100}$ dollars .... | 602 42 |
| 186 Block 211, lots | A. C. Gibbs & others, the sum of twelve hundred & four & $\frac{85}{100}$ dollars ..... | 1,204 85 |
| Block 212, lots 1 & 8. | M. P. Deady, the sum of three hundred & forty-nine & $\frac{13}{100}$ dollars.. | 349 13 |
| " 212, " 2 & 7. | C. O. Clark, the sum of three hundred & fifty-three & $\frac{56}{100}$ dollars.. | 353 56 |
| " 212, " 3, 4, 5, & 6. | J. S. & O. B. Risley, the sum of five hundred & ninety-two & $\frac{16}{100}$ dollars ..... | 592 16 |
| " 213. | Thomas F. Scott, the sum of one thousand & ninety-five & $\frac{31}{100}$ dollars ..... | 1,095 31 |
| " 214. | Genevive G. H. Brooke, wife of L. Brooke, the sum of twelve hundred & four $\frac{84}{100}$ dollars..... | 1,204 84 |
| " 215. | Mary L. Pittock, the sum of sixteen hundred & forty-two & $\frac{98}{100}$ dollars ..... | 1,642 98 |
| " 216. | Levi Estes & D. S. Stimson, the sum of sixteen hundred & forty-two & $\frac{98}{100}$ ..... | 1,642 98 |
| " 217. | Sylvester & Mary Ann Pennoyer, the sum of sixteen hundred & forty-two $\frac{98}{100}$ dollars..... | 1,642 98 |
| " 218. | A. M. & L. M. Starr & others, the sum of fifteen hundred & thirty-three & $\frac{45}{100}$ dollars ..... | 1,533 45 |
| " 219. | James B. & Sarah E. Harker, the sum of sixteen hundred and forty-two $\frac{98}{100}$ dollars ..... | 1,642 98 |
| " 220, L. 1, 2, 7, & 8. | O. B. & A. B. Gibson, the sum of seven hundred & ninety-four & $\frac{11}{100}$ dollars ..... | 794 11 |

| | | | |
|---|---|---|---|
| " 220, | " 3, 4, 5, & 6. | Francis M. & Elizabeth D. Warren, seven hundred & ninety-four & $\frac{11}{100}$ dollars | 794 11 |
| " 249. | | S. N. Arrigoni & wife, thirteen hundred & sixty-nine & $\frac{15}{100}$ dollars | 1,369 15 |
| 187 Block 250. | | Alexander & Christiana E. Hamilton, fourteen hundred & twenty-three & $\frac{91}{100}$ dollars | 1,423 91 |
| Block 251. | | W. A. Abbott, the sum of thirteen hundred & fourteen & $\frac{39}{100}$ dollars | 1,314 39 |
| " 252. | | W. A. Abbott, the sum of fourteen hundred & twenty-three $\frac{92}{100}$ dollars | 1,423 92 |
| " 253, L. 3, 4, 5, | & 6. | W. A. Abbott, the sum of seven hundred & eleven & $\frac{96}{100}$ dollars | 711 96 |
| " 254, L. 1. | | Jno. & Mary Huling, the sum of two hundred & ten & $\frac{28}{100}$ dollars | 210 28 |
| " 254, " 2, 3, 4. | | Joseph & Isaac Bergman, the sum of five hundred & thirty-seven & $\frac{79}{100}$ dollars | 537 79 |
| " 254, " 5, 6. | | G. H. Triboo & others, the sum of three hundred & fifty-five $\frac{90}{100}$ dollars | 355 90 |
| " 254, 7 & 8. | | A. M. & L. M. Starr & others, the sum of three hundred & thirty-seven & $\frac{90}{100}$ dollars | 337 90 |
| " 255. | | Lansing Stout, the sum of twelve hundred & four & dollars $\frac{85}{100}$ | 1,204 85 |
| " 256. " 1, 2, 3. | | Jacob Gozette, the sum of four hundred & seventy-five & $\frac{37}{100}$ dollars | 475 37 |
| " 256. 4. | | Vincent Rand, the sum of one hunhundred & eighty-six & $\frac{19}{100}$ dollars | 186 19 |
| " 256. 5. | | O. B. Risley & E. W. Fine, one hundred & sixty-eight & $\frac{12}{100}$ dollars | 168 12 |
| " 256, " 6, 7. 8. | | George Taylor, the sum of four hundred & twenty-nine & $\frac{91}{100}$ dollars | 429 91 |
| " 257, " 1, 2, 7, 8. | | A. E. Wait & J. K. Kelley, the sum of six hundred & twenty-nine & $\frac{81}{100}$ dollars | 629 81 |
| 189 Block 257, lots 3, | 4, 5, & 6. | S. Norris, the sum of six hundred & twenty-nine & $\frac{81}{100}$ dollars | 629 81 |
| Block 258. | | Isaac B. Smith, the sum of twelve hundred & fifty-nine & $\frac{61}{100}$ dollars | 1,259 61 |
| " 259, lots 1, 2. | | Charles & Mary Warren & others, the sum of three hundred & eighty-three & $\frac{40}{100}$ dollars | 383 40 |
| " 259, " 3. | | Charles & Mary Warren & others, the sum of one hundred & sixty-four & $\frac{29}{100}$ dollars | 164 29 |
| " 259, " 4. | | Charles & Mary Warren and others, the sum of one hundred & sixty-four $\frac{29}{100}$ dollars | 164 29 |
| " 259, " 5, 6, 7, 8. | | Charles & Mary Warren & others, the sum of five hundred & forty-seven & $\frac{63}{100}$ dollars | 547 63 |

| | | | |
|---|---|---|---|
| " | 260. | W'm Cree, adm'r, est. of Robert Thompson, dec'd, one hundred & ninety-five & $\frac{31}{100}$ dollars..... | 1,095 31 |
| " | "G," south half. | Isaac A. Davenport, (fractional) eight hundred & seventy-six & $\frac{25}{100}$ dollars ..... | 876 25 |
| " | "G," north half. | James Fields, the sum of nine hundred & eighty-five & $\frac{79}{100}$ dollars.. | 985 79 |
| " | "H." | Stephen Coffin, adm'r of Elijah Hill, one thousand nine hundred & seventy-one & $\frac{58}{100}$ dollars. ..... | 1,971 58 |
| " | I. | Hiram & Hannah M. Smith, one thousand nine hundred & seventy-one & $\frac{58}{100}$ dollars..... | 1,971 58 |
| " | J. | Hiram & Hannah M. Smith, the sum of fourteen hundred & seventy-eight & $\frac{67}{100}$ dollars..... | 1,478 67 |
| | | Total thirty-nine thousand one hundred & fifty-six & $\frac{02}{100}$ dollars..... | $39,156 02 |

That the said sums be a lien upon the said parcels respectively, and if not paid by the party in possession and claiming the property
190 within ninety days, that execution issue requiring the sheriff to sell so much of any parcel upon which such sum is charged as aforesaid as may be necessary to pay said amount and accruing costs, and it appearing that there are conflicting claims between the heirs and purchasers of D. H. Lownsdale to portions of the tract allotted to said heirs and purchasers according to their respective interest, and that it is not practicable to make up and determine the issues between said parties in this suit, it is ordered, adjudged, and decreed that nothing herein or hereby done shall prejudice any lawful claim of any of the defendants being heirs of, or claimants under, Daniel H. Lownsdale as between themselves; nor shall this decree be any bar to any other action, suit, or proceeding between any of the defendants in this suit to settle and determine their conflicting claims; and in case any of the defendants being in possession under a conveyance from Daniel H. Lownsdale, or claiming any parcel as heir or vendee of said Lownsdale, shall pay the amount of compensation hereby charged upon such parcel, and afterwards be evicted from such parcel, or any portion, or shale thereof by any other defendant claiming under said Lownsdale, he shall be entitled to claim and have a lien upon such land for the reimbursement of said money and interest, or such part of it as the portion from which he is evicted is to the whole parcel. It is further ordered and decreed that the costs and disbursements, including the fees of referees, be paid by the parties to this suit in proportion to their respective interests,
191 and that the same be apportioned pro rata among the claimants according to the values fixed to their parcels by the report aforesaid, and that the same be paid or collected in like manner as the compensation above stated. It is further ordered that the compensation be paid—one-third ($\frac{1}{3}$) to Martin Gillihan, the general guardian of William Gillihan, and one-third ($\frac{1}{3}$) to John A. Blanchard, general guardian of Ruth A. Lownsdale, and one-third ($\frac{1}{3}$) to J. P. O. Lownsdale, general guardian of Millard O. Lownsdale, for the benefit of their respective wards, upon their filing, each, an additional bond in the sum of ten

thousand dollars, ($10,000,) conditioned as the law requires, with two or more sureties.

To the foregoing order & decree the defendants, by their respective attorneys, excepted.

(Signed) ERASMUS D. SHATTUCK, *Judge.*

STATE OF OREGON,
*County of Multnomah, ss:*

I, B. L. Norden, clerk of the circuit court of the State of Oregon for said county, do hereby certify that the foregoing *copies* of decrees has been by me compared with the originals, and that it is a correct copy of the whole of such original as the same appears of record at my office, and in my custody.

192 In testimony whereof I have hereunto set my hand and affixed the seal of said court this 23d day of January, A. D. 1869.

[CIRCUIT COURT SEAL.] B. L. NORDEN, *Clerk.*

[U. S. rev. stamp, 5-ct. cancelled.]

*Copy of execution.*

UNITED STATES OF AMERICA,
*District of Oregon, ss:*

The President of the United States of America to the marshal of said district, or his deputy, greeting:

Whereas on the 21st day of September, A. D. 1869, a decree was duly given and entered by the hon. the circuit court of the United States for the district of Oregon, in a suit entitled John R. Lamb et al. vs. I. A. Davenport et al., by which the said I. A. Davenport was decreed to have a lien upon that certain real property situate in the city of Portland, county of Multnomah, State of Oregon, known and described as follows, to wit: Commencing at the southeast corner of the south half of block "G," as known and described on the maps of said city of Portland; thence northerly along the east boundary of said block "G" two hundred and thirty feet; thence westerly on a line parallel with the south boundary of said block G two hundred feet; thence southerly along the west boundary of said block G one hundred and thirty feet; thence easterly on a line parallel with the south boundary of block G one hundred feet; thence southerly on a line parallel with the west boundary of said block G one hundred feet; thence easterly
193 along the south boundary of said block G one hundred feet to the place of beginning, for the sum of eight hundred and seventy-six $\frac{25}{100}$ ($876 25) dollars, and interest thereon, at the rate of ten per cent. per annum, from November 12, 1865, amounting to the sum of three hundred and forty-three $\frac{25}{100}$ dollars, ($343 25;) and also the sum of one hundred and thirty-three $\frac{34}{100}$ dollars, ($133 34,) costs of suit, and that execution issue against said land, to satisfy said lien, commanding the sale at public auction, as upon execution at law, of the smallest amount of said lands which shall be sufficient to satisfy said sums of money, in all amounting to the sum of one thousand three hundred and fifty-two $\frac{84}{100}$ dollars, ($1,352 84,) and interest, and all accruing costs:

Now, therefore, in the name and by the authority aforesaid, you are hereby commanded that, out of the said before-described real estate in said city of Portland, you cause to be made, in manner aforesaid, the

amount of said decree aforesaid, with interest and costs that may accrue, and of this writ make legal service and due return.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court hereto affixed, this October 16th, 1869.

[U. S. CIRCUIT C. SEAL.] RALPH WILCOX, *Clerk.*

194 UNITED STATES OF AMERICA,
*District of Oregon, ss:*

I hereby return the within execution to the clerk of the U. S. circuit court, without making sale of the within-described property, by order of W. Lair Hill, counsel for complainant.

THOMAS G. YOUNG,
*U. S. Marshal for Oregon,*
By JOHN DOLAN, *Deputy.*

(Original endorsed:) "Returned & filed, December 11th, 1869. Ralph Wilcox, clerk."

195 UNITED STATES OF AMERICA,
*District of Oregon, ss:*

I, Ralph Wilcox, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing is a full, true, and correct transcript of the record, and of the exhibits and testimony had and made in the said entitled cause, together with the citation on appeal taken in said cause.

Witness my hand and the seal of said court at Portland, in said district, on this the twelfth day of November, A. D. 1870.

[SEAL.] RALPH WILCOX, *Clerk.*

[5-cent int. rev. stamp affixed and canceled.]

(Indorsement on cover:) No. 327. Isaac A. Davenport, appellant, vs. John R. Lamb, Emma S. Lamb, Ida Squires & her guardian, W'm E. Cooper, James P. O. Lownesdale et al. Oregon C. C. U. S. Filed 5th December, 1870. United States Supreme Court. John R. Lamb et al., complainants & appellees, vs. J. A. Davenport, defendant & appellant. Transcript of record.

IN THE

# Supreme Court of the United States.

No. 128.—DECEMBER TERM, 1871.

JOHN R. LAMB AND EMMA LAMB AND IDA SQUIRES, COMPLAINANTS,

VS.

JAS. P. O. LOWNESDALE, MILLARD O. LOWNESDALE, RUTH A. LOWNESDALE, WILLIAM E. COOPER, AND MARY E. COOPER AND ISAAC A. DAVENPORT, DEFENDANTS.

*In Equity. For Partition.*

*Appeal from the Circuit Court of the United States for the District of Oregon.*

W. W. CHAPMAN,
*Solicitor for Appellant.*

Pearson, Printer, corner 9th & D sts., Washington, D. C.

IN THE

# Supreme Court of the United States.

No. 128.—December Term, 1871.

JOHN R. LAMB AND EMMA LAMB AND IDA SQUIRES, Complainants,

vs.

JAS. P. O. LOWNESDALE, MILLARD O. LOWNESDALE, RUTH A. LOWNESDALE, WILLIAM E. COOPER, AND MARY E. COOPER AND ISAAC A. DAVENPORT, Defendants.

*In Equity. For Partition.*

*Appeal from the Circuit Court of the United States for the District of Oregon.*

W. W. CHAPMAN,
*Solicitor for Appellant.*

Pearson, Printer, corner 9th & D sts., Washington, D. C.

IN THE

# Supreme Court of the United States.

No. 128.—DECEMBER TERM, 1871.

JOHN R. LAMB AND EMMA LAMB AND IDA SQUIRES, COMPLAINANTS,

vs.

JAS. P. O. LOWNESDALE, MILLARD O. LOWNESDALE, RUTH A. LOWNESDALE, WILLIAM E. COOPER, AND MARY E. COOPER AND ISAAC A. DAVENPORT, DEFENDANTS.

*In Equity. For Partition.*

*Appeal from the Circuit Court of the United States for the District of Oregon.*

The leading facts in this case are that Daniel H. Lownesdale, Stephen Coffin, and W. W. Chapman, being the owners and in possession of the Portland land claim, did on the 25th of June, 1850, for the consideration of $60,000, sell and convey to said Chapman a large number of lots and blocks, which included the block in controversy. That the grantors covenanted with the grantee "to warrant and defend said property against all claims, the United States excepted, and that if they should obtain the fee

simple of said property from the government of the United States they would convey the same to the grantee by deed of general warranty," (see Deed, pages 62, 63, printed record,) and that the defendant Davenport, by a successive chain of conveyances, is the assignee of the property in question.

At the date of the deed before referred to Lownesdale was a widower, having three children, James P. O. and Millard O. Lownesdale and Sarah Squires, the mother of the complainants, Emma S. and Ida Squires. In July following the said D. H. Lownesdale married Nancy Gillehan, the widow of William Gillehan, by whom she had had two children, William and Isabella Gillehan. In this marriage Daniel and Nancy had two children, Millard O. and Ruth A. Lownesdale, thus making three classes of heirs. The first to inherit the estate of Daniel, the second to inherit the estate of Nancy, and the third to inherit the estate of Daniel and Nancy respectively.

Daniel H. Lownesdale was a donation claimant under the act of Congress of the 27th September, 1850, dating his settlement and residence from the 22d September, 1848, and which was complete on the 22d September, 1852. Nancy died in April, 1854, before the issuance of certificate or patent, leaving the said William Gillehan and Isabella Potter and Millard O. and Ruth A. Lownesdale her heirs-at-law, and Daniel, her husband and survivor.

On the 17th of October, 1860, a patent certificate issued to Daniel and Nancy for 178 acres, assigning the west half of the tract to Nancy, which embraced the block in controversy, as well as many others sold by Daniel at different periods. —(See certificate, pages 32, 33 of record.)

On the 17th of January, 1860, Daniel procured a *release* from Isabella Potter, formerly Isabella Gillehan, his cotenant.

In 1860, in the month of June, Davenport made an agreement with Lownesdale for the purchase of certain

property which Lownesdale wished to sell, and for the confirmation of title to all other property in the Lownesdale tract, which had been purchased by him, Davenport. The consideration, $2,000, was paid; the list of property was furnished, and the deeds were executed. But the property in question was not embraced in the deed because Lownesdale protested and declared the title to be good and sufficient.

In May, 1862, nearly two years after Lownesdale died, leaving as his heirs-at-law the complainants, and J. P. O. Lownesdale, Millard O. Lownesdale, Ruth A. Lownesdale, and Mary E. Cooper.

In 1865 the said William Gillehan, one of the heirs of Nancy, brought suit in the Circuit Court of the State of Oregon for partition of the Nancy Lownesdale tract, making defendants both the heirs of Daniel and Nancy, together with about 40 other persons, purchasers and occupants under Daniel. The result of this suit was a decree of partition, setting off the interest of Daniel to his heirs and vendees in lots and blocks as they were severally claimed, and the remainder, three fifths of the tract, was set off to the children of Nancy by both her husbands. But because Daniel's vendees claimed and occupied more land than was equal to the value of his share in the whole tract the sum of $39,156.2 was assessed upon the part assigned to such vendees as owelty, to be paid to the children and heirs of Nancy; and this sum was distributed among the several lots and fractions of lots according to their assessed value, in which assessment this block and appellant Davenport, who was a defendant in that suit, and defended for the property in question, were assessed to pay $876.25, and which he paid and which was received by the said children and heirs of Nancy.—(See assessment, page 10, Block "G," I. A. Davenport.)

On the 8th of February, 1868, this bill was filed, and on 15th of the same month a demurrer was interposed and overruled.—(Record, 11, 12.)

On the 16th of April following the defendant, Davenport, filed his separate answer.—(Record, 13 to 19.) The other defendants never answered.

On the 4th of May following the complainants filed 11 grounds of exception.—(Record, 20.) The 1st, 2d, 5th, 10th were allowed and so much of the answer struck out. —(Record, 22.)

The replication was then filed.

## POINTS OF ERROR.

I.—In overruling the demurrer.

II.—In taking jurisdiction to try the adverse claims of Davenport in a suit of partition, and in allowing exceptions to answer.

III.—The decree is erroneous, in not giving to the appellant, Davenport, the whole of the property in controversy, instead of one-fifth of it; and—

IV.—If not erroneous in not giving the whole of the property, it is erroneous in not giving five-eighths.

V.—And if there is not error in either the third or fourth point, it is erroneous in not giving the appellant one-half, instead of one-fifth, of the whole property in controversy.

### SPECIFICATIONS.

*The appellant is entitled to the whole property*, (1) because the first covenant estops the complainants to set up a title built upon possession and occupancy anterior to the date of the covenant, and therefore covered by it; (2) because obtaining the title indirectly met the requirements of the covenant as effectually as though obtained directly from the United States; (3) because neither the *release*, nor either of the decrees in partition, created any new title, but that Lownesdale and his heirs-at-law held the fee, as from the United States, as survivors and tenant in common, and,

therefore, he had obtained the *fee simple* from the United States, and subject to his covenant to convey it, and because of the contract for cofirmation.

*The appellant is entitled to five-eighths of the property, because* (1) Lownesdale, as survivor under the donation law, the act of 27th of September, 1850, was entitled to one-half, instead of one-fifth, if the interest of Isabella is included.

*If the interest of Isabella is excluded, then the appellant is entitled to one-half of the block instead of one-fifth,* because (1) the whole block was assigned and allotted to the vendees and heirs as representing the interest of Daniel and Isabella; (2) that the heirs of Daniel take of him by inheritance, and not by purchase, and, therefore, by the first decree of partition acquired no rights by purchase, Lownesdale's one-fifth taking as much of the block as the one-fifth of Isabella.

## POINTS IN PLEADINGS.

### THE BILL.

1. The court had not jurisdiction to try the controverted title of Davenport in this suit for partition.—(Philips vs. Green, 2 John C., 304; Wilkin vs. Wilkin, 1 J. C., 111.)

2. The prayer of the bill is not commensurate with the statements therein, or with relief against the adverse claims of Davenport.

### THE ANSWER.

3. That part of the answer covered by the 5th exception on pages 15 and 16 of printed record was a legitimate defence, and was erroneously struck out.—(See Act, 27th Sept., 1850, secs. 4, 5, 6, 7, 8.)

4. That part of the answer covered by the 7th exception on page 17 of the record was a legitimate defence, and was erroneously struck out. (The decree of partition, payment of owelty, and deeds constitute a defence.

5. That part of the answer on page 19 covered by the 10th exception was a legitimate defence, and also erroneously struck out.—(See Statute at Large, 496, sec. 4.) Nancy Lownesdale, as the widow of William Gillehan, deceased, had become disqualified to hold, her former husband having died possessed of a land claim, before the passage of the donation law.

ABSTRACT OF EVIDENCE

bearing upon disputed points, as follows:

Copy of the decree made by the state court partitioning the Nancy Lownesdale tract, assigning three-fifths thereof to her heirs, and two-fifths to the vendees and heirs of Daniel H. Lownesdale, assessing owelty upon the two-fifths the sum of $39,156.02, of which $876.25 was assessed to Davenport as claimant and a lien upon block "G" in question.—(Record, 6 to 11.)

Regular chain of title from Chapman to Davenport, as follows:

Certificate of clerk, page 32; testimony of Doblebower, ints. 5, 13, page 66; of Chapman, page 59, interrogatories 8, 9, 10; stipulation, page 35, for the reading of conveyances, to be found on pages 35 to 43, together with finding of the court on page 25, that Davenport is the assignee of the property in question.

The evidence in relation to the contract made between Lownesdale and Davenport on the 11th June, 1860, to the effect that Davenport paid Lownesdale for fractional block 75, and for confirmation of title to all property which he had purchased in the Lownesdale tract; that the property was pointed out to Lownesdale, including block "G."—(See Davenport's Deposition, pp. 44, 45, Interrogatory 3, 5, 6, 7, 8, 9.) The deed for block 75 was executed and a confirmatory deed for several other pieces of property, but that block "G" was omitted to be inserted in the confirmatory deed, because Lownesdale protested that the title was good, and that he did not set

up any claim to it.—(The Deeds, Exhibits "A" and "B," pp. 49, 50, corroborative of Davenport's evidence; the $2,000, expressed as a consideration in one, and $1, expressed in the other.) Davenport asked Lownesdale the meaning of the fence thrown round the tract, including block "G." Lownesdale replied, For convenience of fencing up other property, and not with the intention of holding this.—(Lownesdale's Donation Certificate, page 32; Release by Isabella Potter to her co-tenant, D. H. Lownesdale, page 33.)

UPON THE MERITS.

The first important error arises in the construction and effect given to the covenants contained in the deed of the 25th June, 1850, and to the decree of partition. The covenants are as follows: "That the property aforesaid, unto the covenantee, his heirs and assigns, will warrant and defend against all claims, the United States excepted, and the party of the first part further covenants that if they obtain the fee simple to said property from the government of the United States they will convey the same to the covenantee, his heirs or assigns, by deed of general warranty."

In making the decree, from which the appeal is taken, the first clause in the covenant is unnoticed, and the second clause (including the release obtained from Isabella) is held to operate only upon the same proportional interest in the block which Lownesdale obtained in the tract of 178 acres as survivor of his wife—determined by the court to be only one-fifth of it—notwithstanding the original decree in partition had allotted to the vendees and heirs of Lownesdale the entire block.

It is claimed for the appellant that under the covenants referred to, he is entitled to the whole block in question.

The first covenant protects the covenantee and assigns, in the possession against Lownesdale and all other per-

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It is claimed for the appellant that under the covenants referred to, he is entitled to the whole block in question.

The first covenant protects the covenantee and assigns, in the possession against Lownesdale and all other per-

sons, and against any title engrafted upon it through his instrumentality. He filed his notification, including it, and dating his settlement and residence from the 22d September, 1848, to and including the date of the covenant. This appropriated the possession and the block to his own use, against which he had covenanted to warrant and defend. He was not obliged to do this. He could as easily have omitted it as to have embraced it, and he knew when he did so that his wife would thereby become entitled to an interest in her *own right*, and deprive the covenantee of the possession and title, unless, by the happening of a contingency provided for by the law, (then unlikely to occur,) by which the title and possession might revest in him. In the face of this covenant he took this risk. In consequence of the peculiar form of the covenant, the covenantee might not have been able to maintain an action at law, and because the subject was, for the time, supposed to be out of reach of the arm of a court of equity. But the contingency did happen. The same possession, with a title engrafted upon it, through his instrumentality, revested in him, and it is now within the reach of a court of equity, perfect and complete, as contemplated by the parties in the formation of the second covenant, and therefore his warranty should estop him and his heirs from asserting a right to the possession thus defined into a title through his act.

If we are correct in this view it entitles the appellant to a decree for the whole block.

In respect to the second covenant we claim under it that if the fee vested in the covenantor, by whatever means or through whatever channel, that then, in equity and good conscience, he and those claiming under him are estopped to assert it, if not, under the pleadings, they be bound to convey it.

While it is admitted on the other side that, as *survivor*, Daniel H. Lownesdale, the covenantor, took, by purchase direct, from the United States, and was, to the extent of

this interest, brought within the operation of this covenant, they object that the *release* by Isabella to him, who was her *co-tenant in common*, created in him a *new title indirectly* from the United States, and therefore not to be affected by this latter covenant to convey the fee simple obtained from the United States.

We controvert this proposition throughout. But inasmuch as a release by a tenant in common to a co-tenant is so nearly assimilated to a decree of partition, we defer and consider the two together.

Then, as to the so-called *indirectness* of the title from the United States obtained through Isabella. Admitting for the sake of the argument that it be so, it is not a good reason why, having so obtained it, he should not be held to convey it. There is nothing in the deed or covenants that bound him to apply *directly* or *indirectly* to the United States for the *fee simple*. It was known to be in the United States, and if obtained from it he was to convey it. Neither was there any expression in the covenants or deed that could be construed as intending to prevent him from obtaining it through some other person or channel or that points out any particular mode of obtaining it, whether by purchase or donation, or, if obtained by purchase, that obligated the covenantee to reimburse any expense that might be incurred in so doing. On the contrary, the expressed consideration is presumed to be an equivalent for obtaining and conveying the *fee simple*, and that the contract was made to that end.

It was not the *mode* of obtaining the fee simple nor the *channel* through which it might be obtained that constituted any part of the consideration or that was at all important. Suppose Lownesdale had sold the property in the manner he did, and delivered the possession but had covenanted and bound himself to obtain the fee simple if possible from the United States and to convey it to the covenantee upon a consideration partly paid, and the remainder upon accomplishing the object, and should have, by any indirect means whatever, become invested with

the fee simple *from* the United States and have tendered a conveyence and made demand of the unpaid purchase money, could the covenantee have escaped its payment? By no means. And to bring the case still nearer and almost parallel with this, reverse the proposition and let it be the covenantee who should have tendered performance, the payment of the unpaid purchase money and a demand of conveyance. Would not a court of equity in such case have decreed specific performance? Undoubtedly so. Well, the case is no less strong because all the consideration was paid in hand than if a part or all remained unpaid. The principle is the same.

In either case time or manner of obtaining the fee simple would not be regarded as important. Nor can they be in this.

If we are correct upon this point then the interest of Isabella released to Lownesdale is, with his interest as survivor, subject to the effect of the covenant to convey the fee simple on obtaining it from the United States.

Here arises the question as to how much or to what extent was the interest of Lownesdale as *survivor?* The court below ruled that he was entitled as survivor to but one-fifth of the whole tract. We contend that he was entitled to one-half. The language of the law is: "The survivors and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions." (9 Statute at Large, page 496, section 496.) This we claim requires that the Nancy Lownesdale tract shall be divided equally between the survivors on the one part and the children or heirs upon the other, and with the interest of Isabella under such a division of the tract would entitle him to five-eighths of the whole instead of one-fifth of it, and under the ruling of the court below that he only took in the block an interest proportioned to his interest in the entire tract, the appellant should have had decreed to him five-eighths of the block.

But whether it shall be held that under the act of Congress referred to the survivor takes one-half or one-fifth

of the entire tract, we insist that the ruling of the court restricting Davenport's interest in the block to such proportional interest is erroneous.

This interest, whatever it may have been, was subject to the contingency of partition, and his covenants prior to, like a deed of bargain and sale, after he became invested with title, were subject to the same contingency either by agreement or decree of court. If upon designation and partition the three children of Nancy should take their share outside of it, Lownesdale had it all and every part of it. If it should be in the part allotted to the children of Nancy, Lownesdale had nothing in it. It could not be claimed that his rights in the property were measured by one-half, two-fifths, one-fifth, or five-eighths any more than by ten-tenths or by no part at all. The covenants, therefore, operated upon the entire interest of Lownesdale, and conferred upon his covenantee or assignee the benefits of the contingency, no less than left him and them to its risks.

For a long time it was held that one having a common interest with another in lands, as Lownesdale had with his wife and three or four children, was void as transferring title, (Bartlet vs. Harlow, 12 Mass., 348,) but it is now the prevailing doctrine that such deed is not for all purposes void but can be avoided only by a *co-tenant* who is injured or those claiming under him.

1 Hilliard Real Property, 592.
Harmon vs. Abbott, 12 Mass., 474.
Stark vs. Barnet 15 Cal., 364.

The party making such deed and those claiming under him are estopped.

A release by the children of Nancy to Lownesdale of the block "G" and as well in the case of Isabella, subjected the block to the operation of the covenants; a partition by decree has the same effect.

Johnson vs. Stearns, 7 Cush., 431. 322

The release by Isabella operated only to withdraw her claim; it created no new title. Lownesdale took his interest subject to partition.

15 Cal., 364.

But it is contended on behalf of the complainants and other heirs of D. H. Lownesdale, that by the partition and release of Isabella a new title was created, or that their ancestor, had he been alive, did and would have acquired, and they have in his place acquired an additional three-fifths or four-fifths, (according as the Isabella interest may or may not be included as subject to the covenants,) interest in this block by exchange with Nancy's three children, which, as they say, are not, under any view of the subject, liable to the covenants of Daniel respecting this block. Their position is, that partition is a conveyance, or operates on the title.

This position is controverted. There is nothing in the nature or object of partition to warrant this view of it, and preponderance of authority is against it. The object of partition is to sever *possession;* each tenant after partition, as before, holds by virtue of his antecedent estate, and not of his *co-tenant;* in its nature it is simply a defining or a fixing of boundaries between the several tenants within the whole tract. It may be made in either of three ways, by parol, by voluntary and mutual releases, or by decree. Two or more tenants in common may agree on boundaries, and partition simply by parol, and this, if followed by possession, is, *between the parties*, sufficient and effectual.

15 Cal. 337

Jackson vs. Brant, 2 Cain's Cases, 169.
Do. vs. Hardee, 4 John., 202.
25 Wendell, 434.
20 Barbour, ~~123~~. 135-2-140
2 Patton & Heath 197

Suppose Lownesdale had agreed, with his four co-tenants verbally, that certain lines should separate their in-

terests respectively, and that each should hold in severalty what was within his agreed lines, and they had fenced up their several portions and occupied severally, and this block had fallen within Lownesdale's portion, it will not be contended that such a proceeding between the tenants would originate a new title for either, yet it would be a partition effectual between the parties.

Same authorities.

If parties, however, agree upon boundaries, and carry their partition into effect by deeds, they need not make grants, or bargain and sale; the simplest and least operative form of deed, *a release*, suffices. At common law a release by one co-partner to another was not an alienation and did not create an estate in the releasee. The language of the books is, "the releasee is deemed in law to hold not by the release, but by the original limitation to all the parties. The release is not an alienation, but a mere discharge of the claims of the one to the other. Hence a fee arises out of the original conveyance."

2 Hilliard on Real Property, 316, ed. 1865.

1 Mete. Ky. 145. 5 O. 424 - 9 O. 178 - 17 O. 180

And it is held in Pennsylvania that a deed of partition does not affect the *title* of the parties, but only fixes the boundaries.

Goundie vs. Northampton, 7 Barr., 233, cited in note to 1 Hill'd R. P., 612.

But if parties cannot agree, partition is obtained by decree, as was the case of Nancy Lownesdale's three children. The General Laws of Oregon, page 257, sec. 428, &c., directs that in a proceeding for partition a decree be given that the partition be effectual forever. In such cases no releases or conveyances are necessary. The partition is held effectual without conveyance.

Young vs. Cooper, 3 Johns. Chancery, 295.

16 Ills. 126 - 1 Maryland 277.

Such was the proceeding in the suit in the state court wherein the Nancy Lownesdale tract was partitioned. No conveyances or releases between the tenants were ordered or made, and none were necessary. It is difficult to see wherein or whereby any estate or title was, by this decree, created or passed between the parties, especially since no such effect is allowed to a deed of partition. The estate and title of the four parties who were the original tenants in common, *to wit*: Lownesdale and Nancy's three children, were settled and agreed to in the suit, and were before the court as *antecedent* estates and titles, and all the tract covered by Lownesdale's conveyances was assigned to the representative of Lownesdale, whether vendees or heirs, but no decree was made respecting anybody's title or estate. This decree effected only what Lownesdale and his co-tenants could have done by parol or by voluntary releases, as in case of Isabella. Had D. H. Lownesdale been alive when the decree was made, no new right or title to this block could have been communicated to him, nor any other estate than such as he had after the death of his wife.

1 Maine 369
4 " 458
16 " 88
12 " 142
13 Mass 11
1 Sedg 43

In Mitchell vs. Hazen, 4 Connecticut, 570, cited in 1 Hilllard Real Prop., 594, it is said "that a partition is a mere distribution, and not a conveyance" founded on an antecedent estate, and cannot communicate any new rights. In Contee vs. Godfrey, 1 Cranch Cir. C. R., ~~48~~ 477, the court say of a decree of partition, which had been made between four sisters, (coparceners,) in answer to the position that one took an interest, *by purchase*, from the others through partition, "the partition passed nothing from the three sisters to Mrs. Dawson," (the other sister.) In 13 Ohio, 546, it is held that, by partition, the "tenants, respectively, lose nothing and acquire nothing, except defined boundaries."

We, therefore, claim that the title in fee simple of Lownesdale, as found under each and every partition, whether by parol, by release, or by decree of court, is

held directly of the United States under the provisions of the donation law; and, if so, that the whole of the south half of block "G" is bound, by the covenant, to convey on obtaining the fee simple from the United States.

CONTRACT FOR CONFIRMATION OF TITLE.

Davenport and Lownesdale contracted for confirmation of title to the block in controversy, as follows: Lownesdale wanted to sell block 75, then of doubtful title, and Davenport had purchased a considerable amount of property in Portland, the title to some of which was doubtful, and he wanted that Lownesdale should confirm it. It was finally agreed that Davenport should submit to Lownesdale a list of his property, and that Lownesdale should execute to Davenport a deed for block 75, and a confirmatory deed for all property that had been purchased by him which Lownesdale deemed to be necessary or doubtful, or to which Lownesdale *set up any claim*, and for so doing Davenport was to pay him $2,000. Davenport submitted the list embracing the property, and Lownesdale executed the deeds, but did not embrace the property in question, Lownesdale protesting that the title was good and that he set up no claim to it, and it was not therefore inserted in the deed. Davenport thereupon paid the $2,000.

The agreement and representations are denied, and the statute of frauds is pleaded, because the agreement is not in writing.

The agreement is proved by the evidence of Davenport corroborated by the two deeds of that date—part of the transaction. The only question raised is, whether the contract is within the statute of frauds—not having been reduced to writing.

This is an estoppel *in pais*. The ancestors of the complainants having procured the contract and payment of

S E J 735-Sec 768 - Peavy 297-8
Peavy Jr 196-9

the money upon his contract and representations, they ought not now to be allowed to gainsay its declarations.

W. W. CHAPMAN,
*Solicitor for Appellant.*

# In the Supreme Court of the United States.

DECEMBER TERM, 1871.

ISAAC A. DAVENPORT, *Appellant*,
*vs.*
JOHN R. LAMB, *et al.*, *Appellees.*
} No. 128.

*Appeal from the Circuit Court of the United States for the District of Oregon.*

BRIEF FOR APPELLEES.

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*vs.*
JOHN R. LAMB, *et al.*, *Appellees.* } No. 128.

*Appeal from the Circuit Court of the United States for the District of Oregon.*

## BRIEF FOR APPELLEES.

This controversy is about block "G," in the city of Portland, Oregon.

On the 25th day of June, 1850, Lownsdale, Chapman, and Coffin were joint claimants of the land claim on which said block "G" is situate, and on that day they executed to Chapman a deed for said block "G," and other property, in which the three grantors covenant with the grantee "to warrant and defend said property against all claims, the United States excepted; and further covenant that if they obtain the fee simple to said property from the Government of the United States, they will convey the same by deed of general warranty." (Rec., p. 63.)

June 6, 1865, a portion of said land claim was patented

to said D. H. Lownsdale and his wife Nancy, the west half thereof, on which said block "G" is situate, to said Nancy; and by virtue of the second section of the donation act of Oregon, (9 U. S. Statutes, 496,) in conformity with which said patent was issued, the children and husband of said Nancy, she having died on the 15th of April, 1854, became and were vested with the title to said block "G."

Nancy's children were William and Isabella Ellen Gillihan, by a former husband, and Millard O. and Ruth A., by D. H. Lownsdale, who survived her, each of whom took an undivided one-fifth interest in said property.

January 17, 1860, D. H. Lownsdale purchased the interest of said Isabella Ellen Gillihan, and thereby became the owner of an undivided two-fifths of said block. May 4, 1862, D. H. Lownsdale died. His children by a former wife were J. P. O. Lownsdale, Mary E. Cooper, and Sarah Squires, the latter of whom was deceased, leaving two children, Emma S. Lamb and Ida Squires; so that J. P. O. Lownsdale, Mary E. Cooper, the said two children of Sarah Squires, Millard O. and Ruth A., became the owners of the said undivided two-fifths interest in said block. Subsequently proceedings were had in the courts of Oregon for the partition of said west half of said land, to which proceedings all the parties in this suit and others were parties, and in which the said block "G" was assigned to the representatives of said D. H. Lownsdale, claiming as heirs or vendees.

Davenport claims the south one-half of said block as

vendee through a chain of conveyances from said W. W. Chapman, and by virtue of the above-cited covenant in said deed of June 25, 1850.

Ida Squires and Emma, wife of John R. Lamb, children of Sarah Squires, deceased, plaintiffs in this suit, and Millard O., Ruth A., J. P. O. Lownsdale, and Mary E., wife of William E. Cooper, claim as the heirs of said D. H. Lownsdale.

The court below partitioned said half block by giving one-fifth thereof to Davenport as vendee, and the residue to said heirs.

The question is as to whether or not the said heirs are estopped by the covenant in said deed of 1850.

That they are not appears—

I.

Because the joint covenants of Lownsdale, Coffin, and Chapman, with Chapman, are void of obligation. It is undeniable that a covenant by Chapman, in a deed wherein he is grantor, with himself as grantee in the same deed, is a nullity. Does not the same principle hold good in this case? Lownsdale, Coffin, and Chapman are the party of the first part, and the language of the first covenant is, "the party of the first part covenants," &c. The language of the second covenant is, "and the party of the first part further covenants that if they obtain the fee simple, they will convey the same," &c.

Clearly Chapman could not maintain an action at law upon these covenants.

Can the court hold that these covenants are several, as well as joint? They are clearly and wholly joint in their language. The covenantors were jointly in possession of a parcel of the public lands of the United States. There was no law enabling them to obtain title. There is no reason to suppose that they did not expect to acquire the title jointly when such a law was enacted. Lownsdale and his wife acquired the title, and not Lownsdale, Coffin, and Chapman. Is there anything to show that Lownsdale ought in equity, or intended to be, bound by these covenants under such circumstances? The obligation of these covenants is measured by the words in which they are expressed.

1 Story's Eq., 163.

Farini *vs.* Tesson, 1 Black, 307.

Calvert *vs.* Bradley, 16 How., 580.

## II.

The deed in question is a quit-claim deed, and the "heirs" of the grantors are not named in the covenant. They are not therefore bound.

Co. on Litt., lib. 3, sec. 733, 384*a*; sec. 734, 386*a*.

2 Hilliard on Real Property, p. 359, sec. 13; *ib.*, p. 400, sec. 102.

Dart *vs.* Dart, 7 Conn., 250, and cases cited.

III.

The first covenant is, "to warrant and defend said property against all claims, the United States excepted." When this covenant was made, the title was in the United States, and necessarily, therefore, if not an absurdity, it applies only to possession. It is in effect a covenant against every thing but the title. Chapman's grantee can claim nothing upon this covenant. Lownsdale's heirs have a title, derived from the United States, and it was agreed in the deed that this covenant should not cover that title. The plain meaning of this covenant is, that it shall not bind if the United States does not give the title to the covenantors. This the United States did not do, but gave it to the heirs of Nancy Lownsdale. This is like the case of Cole *vs.* Homes, 2 Johnson's Cases, 203.

IV.

The second covenant is, that if the grantors obtain the fee simple to said property from the Government of the United States, they will convey the same by deed of general warranty. They did not obtain the fee simple to said property, but it was granted by the Government to the heirs of Nancy Lownsdale. There were five of these, including the said Daniel H., and the court below held that he took his one-fifth as a donee of the Government, and that by virtue of this covenant, for further assurance, Chapman's grantee becomes en-

titled to that one-fifth interest. There is no ground for claiming that the other four-fifths are affected by this covenant. Nancy Lownsdale's children do not hold under or through Lownsdale, Coffin, and Chapman, or either of them, but derive their title directly from the United States. There is no privity of contract or estate between them and the grantors in said deed or either of them.

V.

These covenants do not operate as an estoppel. Estoppel in such cases occurs only where a party has conveyed a precise or definite legal title by solemn assurance that he will not be permitted to deny.

Gilmore *vs.* Poindexter, 10 How., 257.

No estate is described as conveyed in the deed where these covenants are found, but, on the contrary, the deed shows upon its face that the grantors had no title.

Covenants of warranty are limited by the nature of the estate conveyed.

Lewis *vs.* Baird, 3 McLean, 78.
Comstock *vs.* Smith, 13 Pick., 116.
Blanchard *vs.* Brooks, 12 Pick., 67.
Sweet *vs.* Brown, 12 Met., 175.
Allen *vs.* Hotten, 20 Pick., 458.
2 Wash., C. C., 665.
Clark *vs.* Baker, 14 Cal., 628.

Nothing was or could be conveyed by said deed on the 25th of June, 1850.

VI.

There is nothing in the decree of partition to affect this question. Block "G," with other property, was by that decree assigned to the heirs and vendees or claimants under D. H. Lownsdale, according to their respective interests. (Record 8.) The rights of these heirs or vendees were left for future adjustment or litigation. The decree does not, in any way, enlarge those rights.

Dawson *vs.* Lawrence, 13 Ohio, 546.

Jackson *vs.* Christman, 4 Wendell, 284.

It is submitted that the decree of the circuit court ought to be affirmed.

GEO. H. WILLIAMS.

*Atty. for Appellees.*

2 John Ch 203
10 Hall 257
3 McLean 78
Chanson v Stacey
Deady -

IN THE

# CIRCUIT COURT

OF THE

# UNITED STATES,

FOR THE

## DISTRICT OF OREGON.

| | | |
|---|---|---|
| LAMB, *et al.*, v. STARR, *et al.* | *In Equity.* | PAGE & HILL, *for Complainant.*<br>CHAPMAN, *for Defendant.* |
| FIELDS, v. SQUIRES. | *In Equity.* | CHAPMAN, *for Complainant.*<br>PAGE & HILL, *for Defendant.* |

BEFORE

**MATTHEW P. DEADY,**

JUDGE OF THE DISTRICT COURT.

PORTLAND, OREGON:
W. D. CARTER, BOOK AND JOB PRINTER.
1868.

# United States Circuit Court,

## DISTRICT OF OREGON.

*January Term, 1868.*

JOHN R. LAMB AND WIFE, *et. al.*,
*v.*
LEWIS M. STARR, *et. al.*
} *In Equity.*

DEADY, *Justice.*—This is a suit for partition of block 218, situate in the city of Portland, and to declare void, a purchase thereof by the defendant Starr, because the conveyance was taken by Starr, with notice, and in violation of certain trusts with which the property was charged in the hands of Starr's grantors. *January* 31

Among other things the Bill states, that on April 15, 1854, Nancy Lownsdale died seized of an estate in fee in the west half of donation claims 40 and 66, containing about 90 acres of land and embracing block 218 in the city of Portland, leaving as her heirs-at-law, her four children, William Gillihan, Isabella Ellen Gillihan, Millard O. Lownsdale and Ruth A. Lownsdale, and her husband Daniel H. Lownsdale, each of whom was thereupon en- Abstract of Bill.

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titled and became seized of an undivided one-fifth of said west half including said block.

That in January, 1860, the said Daniel H. purchased from said Isabella Ellen, her interest in the estate of her mother, Nancy Lownsdale.

That on April 1, 1858, said Daniel H. conveyed by deed of quit claim, without covenants, all his interest in block 218, to Lansing Stout, upon trust, that the said Stout would raise money upon said interest to pay the debts of said Daniel H.; and that on the same day and year, the said Stout, for the purpose of enabling Alonzo Leland to assist him in the performance of said trust, conveyed to said Leland by deed of quit claim, an undivided one-half of his interest in said block upon the trust aforesaid.

That on December 12, 1863, upon an execution issued out of the Circuit Court, for the county of Multnomah, State of Oregon, against the property of said Stout, said block was sold to the defendant, Starr; and that on December 5, 1864, the said Leland in conjunction with his wife, on his own private account and not in pursuance of said trust, conveyed to the defendant Starr, his interest in said block; and that at the time of both such purchases by the defendant Starr, he had full notice of the trust, and well knew that Stout and Leland had no interest in such block except as trustees, and that neither such sales or conveyances to him were made or executed in pursuance of such trust.

That on May 4, 1862, Daniel H. died intestate, leaving as his heirs at law, Emma Lamb and Ida Squires, the children of his daughter Sarah, previously deceased, and his four surviving children,—namely: James P. O. Lownsdale, Mary E. Cooper, Millard O. Lownsdale and Ruth A. Lownsdale, who thereupon were entitled and became seized in fee of an undivided two-fifths of the said west half including said block.

That the said heirs of Daniel H. and of said Nancy being seized as tenants in common of said west half, William Gillihan, one of the latter, commenced a suit for partition thereof in the Circuit Court for the county of Multnomah, State of Oregon, in which suit the parties to this suit and divers others were defendants; and that said court, on May 22, 1865, among other things, decreed, that said Daniel H. in his lifetime was entitled to the one-fifth of said west half as the heir of said Nancy, and also to another fifth as the

vendee of said Isabella Ellen, one of the heirs of said Nancy, and that said William Gillihan, Millard O. and Ruth A. Lownsdale, were each entitled, as the heirs of said Nancy, to one-fifth of said west half; and afterwards, on August 12, 1865, said court, in said suit, by its decree set apart to said William, Millard O. and Ruth A. in severalty, certain specified parts of said west half, and to the heirs and vendees or claimants under Daniel H. according to their respective interests, the remaining portion of said west half, including block 218; and that by reason of such partition being unequal, it was further provided by said decree, that said William, Millard O. and Ruth A. should have a lien upon the portion of said west half set apart to the heirs, etc., of Daniel H., amounting in the aggregate to the sum of $39,156 02, of which sum $1,533 45, was apportioned to said block 218 and decreed to be a lien thereon; and that by reason of such decree and partition, the said heirs of Daniel H. became the owners in fee of the other three-fifths of said block, subject to the lien aforesaid.

That said lien has been paid by the defendant, Lewis M. Starr and the heirs of David H.; and that said heirs are tenants in common of said block, and are in possession thereof.

That the defendants, Hiram and Hannah Smith, claim some right in said block, of which complainants have no knowledge or information.

That the complainants are entitled to an undivided one-fifth of said block, and that the other heirs of Daniel H. are entitled to one-fifth each, subject to the claims and interest, if any, of said Starr, and said Hiram and Hannah Smith.

That the complainants are residents and citizens of the State of Kentucky, and that their interest in said block exceeds in value the sum of five hundred dollars.

Demurrer to Bill.

The defendant, Starr, demurs to so much of the Bill as sets up the trust to Stout and Leland and the violation thereof by the sales to him. To the remainder of the bill he pleads three pleas in bar of the right to the partition prayed for.

Bill need not allege trust to be in writing.

The first and fifth causes of demurrer, may be considered together. They are, substantially, that it does not appear from the Bill that the alleged trust was in writing, and subscribed by either Lownsdale, Leland or Stout.

Our Statute of Frauds, section 771, Civil Code, prescribes

Abstract of pleas to Bill.

The first plea alleges that the defendant, Starr, claims under Lansing Stout, to whom Daniel H. conveyed in April, 1858, as in the Bill mentioned, and that at the commencement of this suit the complainants were not in the possession of the premises in question, but that said defendant was in sole and exclusive possession thereof.

The second plea alleges that the said Nancy did not die seized of the west half of the donation claim in question, nor could she take any part thereof as the wife of Daniel H., because prior to her marriage with said Daniel H., and while she was the wife of William Gillihan, the said William, in the year 1847, settled upon a tract of the public land on Sauvie's Island, in Multnomah county, containing 640 acres, and continued to reside upon and cultivate the same continuously to the time of his death in the year 1850; and that said William, up to the time of his death, complied in all respects with the provisions of the act of September 27, 1850, making donations to settlers upon public lands, etc., whereby upon the death of said William, the same vested in said Nancy and the heirs of said William, and thereby the said Nancy became disqualified to take any part of the donation claim of Daniel H.

The third plea alleges that William Gillihan and Isabella Ellen Gillihan are not the children and heirs at law of Nancy, to whom the said west half was patented; and that said William and Isabella Ellen did not in virtue of said patent referred to by complainant become seized of any part of said Nancy's half of said donation claim.

By the fourth section of the donation act there is granted to a married man, settlers upon the public land, the quantity of 640 acres, "one-half to himself and the other half to his wife, to be held by her in her own right." The section also provides, that where such married persons have complied with the provisions of the act so as to entitle them to the grant as therein provided, "whether under the late provisional government of Oregon or since, and either shall have died before patent issues, *the survivor or children or heirs of the deceased*, shall be entitled to the share or interest of the deceased, in equal proportions, except, etc."

A grant to the children of Nan-

The question sought to be raised by this third plea is, that

only the children of Nancy by Daniel H. the surviving settler, are entitled to any portion of her interest or share in the donation, and that therefore William and Isabella Ellen, the children of Nancy by her marriage with Gillihan are not entitled to any interest in the block in question.

cy Lownsdale includes the children of Nancy by a former husband.

The first position assumed by counsel in favor of his position is, that the patent or grant to the *children* of Nancy Lownsdale, does not include the *children* of Nancy born while she was Nancy Gillihan. In reply to this it is sufficient to say that when Nancy Gillihan changed her name to Nancy Lownsdale it did not affect her identity or destroy the parental relation between herself and the children which she bore while called by the former name. A grant to the children of Nancy Lownsdale must include all the children of the *person* intended and described by this appellation. The name used is the mere description of the *person* of the ancestor, and does not impute to Nancy any particular status or relation on account of which her children, born during the existence of that status or relation should take the land of the deceased to the exclusion of her other children, not so born. A grant to the *wife* of Daniel H. Lownsdale, under some circumstances might probable be limited to the children born of the wife during the existence of the relation imputed to her in the grant; but a grant to the children of Nancy Lownsdale is not limited by the fact that she was the wife of Daniel H. Lownsdale, to the children born during the existence of that relation.

Another argument in support of this plea assumes that the donation is made to the *community* constituted by the marriage, rather than to the married persons individually, and that therefore, in case of the death of either member of this community, the share of such deceased member in the common donation, should only go to the children of such community, who made the settlement and performed the services which secured the grant.

The idea is not without plausibility and apparent equity and justice. But the Statute cannot be so construed without doing violence to its evident purpose and plain language. The act does not give the land to the community constituted by the marriage, but to the married persons individually—"one half

to the husband and the other half to the wife to be held by her in her own right." Besides, at common law, marriage does not constitute a community in which the individuality of the husband and wife is merged and blended for the time being. Such, or something like it, is the doctrine of the civil law, but it is not applicable here.

Upon the death of the wife, before the issuance of the patent, the donation act disposes of her share in the donation, by providing that it shall go to her husband and *children or heirs* in equal proportions. This description of the persons who are to take the share of Nancy in the donation is plain and unequivocal. The words used are not open to construction. The share is given to *her children* without limitation or qualification. William and Isabell Ellen Gillihan are as much the *children* of the deceased Nancy as Millard O. and Ruth A. Lownsdale. Being *her children*, the donation act gives them a proportionate interest in her share of the donation, without reference to the fact of when they were born or by whom begotten.

The words children or heirs in sec. 4 of donation act, how construed.

This conclusion does not involve the question of whether the words *children or heirs* are used in the act as synonymous terms or not. My impression is that they are not, although, as in this case, they *may* coincide and apply only to the same persons. At the death of Nancy—April 15, 1854—there was no statute in Oregon regulating the descent of real property, or declaring who should be the heirs of an intestate, and therefore the subject was regulated by the common law. By this rule her children were her heirs. The donation act does not prescribe who shall be considered the *heirs* of a deceased settler any more than it prescribes who shall be considered the *wife* of a settler. Both these are left to the local law—the law of Oregon.

If the law of Oregon at the time of Nancy's death had prescribed that brothers and sisters should be heirs to the intestate either exclusive or inclusive of the children, it appears to me, that under the donation act, then the children would take to the exclusion of the brothers and sisters. Congress seems to have intended to secure the share of the deceased, to her children, if any, whether the law of Oregon made them heirs or not. Beyond this it left the matter to the local law, by providing the alternative, that in default of children, such share should go to her heirs, whoever they might

be. Who would be entitled to claim *as heir* of the deceased would in all cases depend upon the law of Oregon at the time of the death, but persons claiming *as children* are by the donation act preferred to those claiming simply *as heirs* by the local law.

It will be noticed that the plea denies the right of William as well as of Isabella Ellen. The former is not a party to this suit, nor do either of the parties before the court claim under him.

But if neither had any right in the share of their mother, then Daniel H., as survivor, would take one-third instead of one-fifth.

The interest which Daniel H. took as survivor, Starr claims under the conveyance to Stout and the subsequent conveyance to himself. Neither is Isabella Ellen a party to this suit, but the complainants claim an undivided interest in the one-fifth which their ancestor, Daniel H., is alleged to have purchased from her, subsequent to this conveyance to Stout. As to these interests, the plea, if good in law, would be a bar to the relief sought by the complainants.

The plea is insufficient in law and therefore overruled.

The donation act does not include settlers upon the public lands, who died before its passage.

The second plea assumes that the fourth section of the donation act, includes settlers upon the public lands who died in Oregon before its passage—September 27, 1850. At least the plea must be so construed; for, although the averment is that Nancy's first husband—Gillihan—died "*sometime* in the year 1850," yet this being uncertain in point of time, must be taken most strongly against the party making it. So construed, the legal effect of the allegation is, that Gillihan died *sometime* in 1850, but *prior* to September 27 of that year.

In support of this plea, it is maintained by Starr's counsel, that Gillihan having died in the possession of the land claim on Sauvie's Island, his wife became entitled to one-half thereof in her own right, and therefore she was not qualified to take another donation as the wife of Daniel H. The disqualification relied on is found in the proviso to section 5, of the donation act. It reads—"That no person shall ever receive a patent for more than one donation of land in said Territory in his or her own right." Admitting for the moment that Nancy became entitled to the half of the Gillihan donation claim upon the death of the settler, it does not appear that she ever obtained a patent for it, or took any steps to assert such right in the proper Land Office of the United States, or elsewhere.

It has always been understood, and there is nothing in the donation act to the contrary, that a settler upon the public lands, might change his location and settlement as often as he saw proper, before he filed his notification of selection in the Land Office, and probably at any time before making final proof and receiving a certificate. In such case the first location is abandoned and the land is open to any other settler who may choose to take it up. A wife cannot become a settler and take land for herself independent of her husband. While he lives, her action in this respect is subordinate to his. But if upon the death of the settler, the wife becomes entitled to take one-half of the land upon which he died, pending the performance of the condition, of residence and cultivation, she may than abandon that right and by becoming the wife of another, be qualified to take her share in the donation of the second husband. In such case, it is certain, that she will never receive a patent for more than one donation, for as to the settlement of the first husband, she does not claim any interest in it or make proof of any right thereto.

Again, it appears by the plea, that Gillihan died before he had "complied with the provisions of the act,"—his settlement commencing in 1847 and his death occuring in 1850, before the completion of the four year's residence and cultivation. If it be the law, as this plea assumes, that the grant in the fourth section of the act is not confined to persons in being at the passage of the act, but that it includes settlers upon the public lands prior thereto, yet, at least, such settlers must have completed the four years residence and cultivation required by the act, before it can be claimed that "they have complied with the provisions of this act so as to entitle them to the grant as above provided." (*Donation act, sec.* 4.) Certainly, there is no provision of the act which disposes or gives to any one the land occupied by a settler, who died before the completion of the four years residence and cultivation, and prior to the passage of the act. Section eight does not help the plea in this respect, for that manifestly contemplates only the case of the death of a settler *after* the passage of the act. "To give that section any other than a prospective operation is to do violence to its language; and the mischief resulting from giving it a retro-active effect, would be infinitely greater than would follow from a like construction of section four." (*Ford vs. Kennedy*, 1 *Oregon R.* 168.)

As has been already stated, this plea assumes that section 4 of the donation act includes settlers upon the public lands who died in Oregon before the passage of the act. If the act does not warrant this assumption, then this plea is insufficient, without reference to the points already considered.

As the section stands, its length and the multiplicity and variety of provisions and qualifying clauses which it contains, not affecting this question, naturally tend to obscure the actual connection and dependence which exist between those different parts of it, which prescribe *who* may take under it. Read with these, at present immaterial clauses eliminated, the section declares—"That there shall be and hereby is granted to every white settler or occupant of the public lands, * * * *now residing in said Territory*, (Oregon), and who shall have resided upon and cultivated the same for four consecutive years, * * * if a married man, * * * the quantity of one section, * * * one-half to himself and the other half to his wife to be held by her in her own right; * * * and in all cases where *such* married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the provisional government of Oregon, or since, and either *shall have* died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions."

It is only necessary to read the section carefully to see that the "such married persons," must refer to the antecedent—a settler upon the public lands *now* residing in said territory, and his wife—whoever and wherever she may be.

This settles the question against the plea; Gillihan was dead when the act passed. No grant is made to the dead husband, nor does any enure to his widow. The woman only takes on account of her *wifeship*, and not as a *settler*. (*Vandolf vs. Otis*, 1 *Oregon R.* 156, 157).

The words, "and if either shall have died before patent issues," are easily reconciled with this conclusion; and if there is any difficulty in so doing, they must yield to the clear and unqualified language descriptive of the person to whom the grant was made, or offered. The subsequent provisions of the section providing for the disposition of the donation upon the contingency of the donee's death

before the issuance of the patent, cannot be allowed by implication to enlarge the terms of the grant.

The act contemplates and provides for the issuance of a patent to the settler and his wife at some future time. In the meantime, after the performance of the conditions prescribed by the act, the settler or his wife might die. In contemplation of this contingency, which might happen before the issuance of the patent, both events being in the future, the section promptly and gramatically declares, "and if either (the settler or wife) shall have died before patent issues, the survivor and children or heirs of the deceased, shall be entitled to the share or interest of the deceased, in equal proportions."

This is the construction which was given to this section by the Supreme Court of the late Territory of Oregon in *Ford vs. Kennedy*, 1. *Oregon R.* 166; and I think the decision in that case has been generally accepted as correct, by the profession. The evils which would have resulted from a contrary construction are not exaggerated in the following extract from the opinion in that case by the Chief Justice:

"To construe the donation act so as to invest persons, dead before its passage, with an inheritable interest in the public lands of this Territory, would be not only to give the said act a retrospective operation, contrary to a sound construction of the Statute, but to open a Pandora box of evils upon the community; for the heirs of these early settlers, who died before 1850, would rise up with their unknown and undiscoverable titles to supplant others who found the land, thus claimed, vacant, and took it, in good faith, as a part of the public domain."

This plea is insufficient and must therefore be overruled.

Equity jurisdiction of this court not limited by State statutes.

The first plea assumes that a party *not* in possession cannot maintain a suit in equity in this court for partition. The ground of this objection is section 419 of the civil code, which enacts that "persons who hold and *are in possession* of real property as tenants in common," may maintain a suit in equity for partition.

Counsel for the defendant argues that this Statute limits the jurisdiction of this court, as a court of equity. No authority was cited in the support of this position, but section 34 of the judiciary act seemed to be relied upon. This section provides, that, "The laws of the several States, * * * shall be regarded as

rules of decision *in trials at common law*, in the courts of the United States, where they apply."

But this section, as its language plainly imports, does not extend to suits in equity, and it has even been construed not to extend to *criminal* cases at common law. (12, *How.* 363).

The jurisdiction of the courts of the United States in equity is not affected by the Statutes of the State. (3 *Wheaton* 222, 4 *Wheaton* 115.) In this last case Chief Justice Marshall says,—"as the courts of the Union have a chancery jurisdiction in every State, and the judiciary act confers the same chancery powers upon all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States." See also, 12 *How*, 147. In *Neves et al. vs. Scott et al.*, (13 *How*, 272,) the Supreme Court say,—"Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply each of them to each particular case, as they may find justly applicable thereto. * * But in all the States, the equity law, recognized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court."

Want of possession not a bar to suit for partition in equity.

The equity jurisdiction of this court not limited by section 419 of the Civil code, the right of the complainants to maintain this suit for partition against Starr, depends upon the general principles of equity jurisprudence. The jurisdiction of a court of equity over a suit for partition, so far as I have been able to ascertain, never did depend upon the possession by the complainant. Where the title of the complainant, whether it be legal or equitable, is not doubtful or suspicious, equity will take jurisdiction and decree partition, without reference to the question of possession. But in the case of an alleged legal title, when either of these objections appear, it is usual, first to send the complainant to a court of law to try his title, and in the meantime retain the bill to await the result. In the case of an equitable title the court of equity first ascertains the title, and if found for the complainant, proceeds to make partition.

(1 *John Ch. R.* 117, 4 *Ibid*, 275, *Hoffman Ch. R.* 562, 4 *Kent* 364).

But even if the possession by the complainants was necessary to enable them to maintain this suit, they must be deemed to be in possession. The possession of one tenant in common is that of his co-tenants. (*Hoffman Ch. R.* 24). This decision was made under a Statute word for word like ours. In *Brownell vs. Brownell*, (19 *Wend.* 369) the court in commenting upon the same Statute, say, "Possession would follow the legal title, no *adverse* possession having been shown. The provisions of the Statute * * * do not require a *pedis possessio* to entitle a party to institute proceedings in partition.

In this case, the plea under consideration states that the defendant is in the exclusive possession, but it also discloses the fact that his *right* to the possession depends upon the deed of Daniel H. to Stout and the mesne conveyances thereafter to himself. The plea is not accompanied by an answer denying the trust upon which that deed was made to Stout and his own knowledge of it, when he acquired the title conveyed to Stout. For ought that appears in the plea, Starr may simply hold the legal title to the interest conveyed to Stout in trust for the complainants. But waiving this consideration, as the matter now appears, there can be no pretense that Starr acquired any other interest in the block, than Daniel H. conveyed to Stout. The plea does not claim any more than this. Yet two years after the conveyance to Stout, Daniel H. purchased the interest of Isabella Ellen in the estate of her mother. This was an undivided one-fifth. This interest descended to the complainants in common with the other defendants, heirs of Daniel H. The deed to Stout was a simple quit-claim without convenants, and does not affect the after acquired interest of Daniel H. Allowing Starr then all the interest which he can or does claim by virtue of the conveyance to Stout, the complainants are at least seized of an undivided interest in the block. They and he are tenants in common, and his possession is theirs for the purpose of this suit. (14 *Mass.* 433).

This plea being insufficient must be overruled.

As a matter of practice, it is proper to add that in equity a defendant is not allowed to plead more than one plea to the

Bill, w'thout special leave of the court first obtained, and such leave will only be given in particular cases, when the necessity therefor is obvious. (*Story's Eq. Pleadings, Sec.* 657).

In this case no objection was made by the complainants and the pleas were treated as if pleaded with leave of the court.

# United States Circuit Court,

## DISTRICT OF OREGON.

*January Term, 1868.*

JAMES FIELDS,

*v.*

IDA SQUIRES, *by* GUARDIAN.

*In Equity.*

BY this suit the complainant seeks to have his title to the north half of block G in the city of Portland ascertained and declared, as against the defendant, and also, to obtain a decree against such defendant for specific performance of the covenant of her ancestor for further assurance, in regard to said block. *February* 15.

From the Bill it appears, that on June 25, 1850, Daniel H. Lownsdale, Stephen Coffin and W. W. Chapman, had surveyed and laid off divers lots and blocks in the town of Portland, and made a map thereof, designating the same by numbers and letters, and being in possession, said Lownsdale, Coffin and Chapman by deed of that date, assumed and represented themselves to be the Abstract of the Bill.

proprietors of the town of Portland, and "for a valuable consideration, thereby released, quitclaimed and confirmed, unto the said Chapman, to have and to hold to him and his assigns forever, a certain two acre block of land, situate in said town, and represented upon the map thereof by the letter G, and then and there delivered to him the possession thereof. That the said grantors in and by said deed covenanted to and with the said Chapman, that the property aforesaid, unto him, his heirs and assigns, they would warrant and defend against all claims, the United States excepted; and that if they should obtain the fee simple of said property from the United States, that they would convey the same to the said Chapman by deed of general warranty."

That on March 7, 1851, Chapman sold and conveyed the north half of said block G to William Dobleblower, and gave him possession, and that on August 27, 1852, Dobleblower sold and conveyed said north half to complainant, and gave him possession, which possession he still retains.

That on September 22, 1848, said Daniel H. being a widower and unmarried, settled on the tract of land embracing block G, and containing less than 320 acres, and continued such residence and settlement for more than four years thereafter, and thereby became the owner of the same under the donation act of September 27, 1850.

That in the year 1850 or 1851, Daniel H. intermarried with Nancy Gillihan, the widow of William Gillihan, and in April, 1854, said Nancy died intestate. In the year 1862, Daniel H. died intestate. On October 17, 1860, a patent certificate issued from the U. S. Land Office, at Oregon City, for the land settled by Daniel H., to him and the heirs at law of his deceased wife, in which certificate, the west half of said tract of land embracing Block G, was assigned to said heirs at law.

That at the time of the marriage, between Daniel H. and said Nancy, the former was the father of three children by a former wife—namely: James P. O., Mary E., and Sarah; and the said Nancy was the mother of two children by her former husband—William Gillihan—namely: Isabella Ellen and William.

That in the year 1848, Nancy and her former husband—Gillihan—settled on a tract of land, situate on Sauvie's Island, in Multnomah county, containing less than 640 acres, and continued to re-

side upon and cultivate the same, until some time in the year 1850, when said Gillihan died,—having done and performed all things in and upon said land, as contemplated by the said act of September 27, 1850, up to the time of his death, by means whereof the widow of said Gillihan became and was entitled to the one-half of said tract, and is therefore not entitled to any part of the donation claim of said Daniel H.

That, if notwithstanding the premises, the said Nancy was entitled to a part of the donation claim of the said Daniel H., she had notice, and good reason to be informed, that the said Daniel H. had sold and conveyed block G as aforesaid, "and that she took such part subject to the contract aforesaid of the said Daniel H., and that her heirs and assigns are bound thereby."

That on the death of Daniel H. he left as his heirs-at-law, the said James P. O., Mary E. (now wife of William E. Cooper), and Ida Squires the defendant, and Emma Lamb, children of the said Sarah deceased, and Millard O. and Ruth A., children of the said Daniel H. and Nancy; and that on the death of the said Nancy, she left as her heirs-at-law, the said William and Isabella Ellen Gillihan and the said Millard O. and Ruth A. Lownsdale.

That in the year 1860, Daniel H. purchased from the said Isabella Ellen (then intermarried with William Potter) and her husband, "all the right, title and interest of the said Isabella in said tract of land as the heir of said Nancy;" and that by means of the death of said Nancy and the purchase aforesaid, the said Daniel H. became "the owner and holder of the title of the government of the United States of two-fifths of the lands alleged to be patented to the said heirs of Nancy," including Block G, and that thereupon "the said two-fifth's interest in the north half of said block enured to the use and benefit of the complainant."

That in 1864, the said William Gillihan, jr., by his guardian Martin Gillihan, commenced a suit in the Circuit Court for the County of Multnomah, State of Oregon, for a partition of the tract of land patented to the heirs at law of Nancy, claiming in such suit to be entitled to one undivided fifth thereof; and that the heirs-at-law of both Daniel H., and Nancy as well as the grantees and assignees of the former were made parties to such suit; and that by the decree rendered therein the said two-fifths of said tract of land was recognized as having belonged to said Daniel H. "with all the

equities in partition." And divers lots and blocks in said tract having been before then laid off and "disposed of" by the said Daniel H. and improved by different persons, were allotted to the heirs, grantees and assignees of the said Daniel H. and to make partition equal the said lots and blocks were severally encumbered with large sums of money, which if not paid within a specified time should be sold to pay the same; and that if any claiming under the said Daniel H., and paying such assessments, should be afterwards evicted, that the sum so paid and interest should continue a lien on the particular tract for re-imbursement. That the said block G was among the blocks so assigned in partition to the heirs and grantees of the said Daniel H., and the sum of $998 79, and $—— costs, was assessed upon the north half of said block, which your Orator was compelled to and did pay to prevent the same from being sold.

That the defendant, Ida Squires, though a resident and citizen of Kentucky, had a guardian (the said William E. Cooper,) a resident of the city of Portland, and that said guardian and his ward well knew that the complainant was about to pay said sum, claiming this property as his own, yet neither of them made any objection thereto, but suffered and encouraged the complainant to pay the same: "Whereby, the said Daniel H. in his life time and his heirs at law since his death, became and are bound to convey the said half block to your Orator, by a good and sufficient deed;" and that the said Ida Squires, by virtue of the covenants in the deed of June 25th, 1850,—the possession of the complainant, and the said decree and the payment of the assessment thereunder, is estopped to set up the title of the said Daniel H., so obtained as aforesaid, as a defence to the suit of the complainant.

That the defendant paid Dobleblower $250 for the premises in question and has since expended about $2700, in improving the same, and that his possession from the date of such purchase until the present time has been visible and notorious, to the knowledge of Daniel H. and Nancy while living and of the heirs of the former, since his decease; and that at the date of such purchase, Daniel H. "assured the complainant that the title was good," which assurance said Daniel H. in his life time, "frequently" repeated to the complainant—by means whereof the defendant as heir-at-law of Daniel H., is estopped and ought

to be barred from asserting any claim to the premises or denying your Orator's right thereto."

Opinion of the Court.

The defendant demurs to the Bill, and maintains in argument, that upon the facts stated the complainant is not entitled to any relief.

The objections of the defendant, as specified in the demurre and developed and amplified on the argument, involve the consideration of questions, some of which, besides being interesting in themselves, are of the highest practical importance to this community.

Chapman, grantor and grantee in deed.

The deed is objected to as inoperative and void because Chapman is both grantor and grantee, covenantor and covenantee, therein. Of course, Chapman could not grant to himself or covenant with himself. So much of the deed may be treated as surplusage—a blunder of the scrivener. There still remains, the grant and the covenants of Lownsdale and Coffin to and with Chapman, and these are easily and fairly divisible and separable from the void and repugnant grant and covenants by Chapman to and with himself.

Covenants joint, yet defendant liable to the extent of her interest in the land.

Waiving this objection, it is further objected, that the covenants with Chapman by Lownsdale and Coffin are joint and not several, and that therefore the remedy upon them must be joint, against both Lownsdale and Coffin or their representatives.

Counsel for the complainant maintains that equity will treat these covenants as joint or several, and among others cites, 2 *Wheat.* 45, and 1 *Story's Eq.* 162-3. But neither of these authorities support the position. In the case cited from Wheaton, the question was not whether the covenant could be treated as *joint* or *several*, but what constituted a *breach* of it. The case only decides that a joint covenant against encumbrances is broken by an encumbrance suffered or done by a part of the covenantors, and that all the covenantors are liable for such breach. To the same effect is *Meriton's* case, (*Noy's R.* 86) cited in the note to 2 Wheaton. There the lessors covenanted against any encumbrance made by *them*. One of the lessors made a lease to a stranger. In an action on the covenant against *both* lessors, it was held that the act of *one* constituted a breach, for which the lessors were jointly liable.

The citation from Story only goes to the extent, that in equity a joint debt will be deemed the several debt of each of the contractors in a certain class of cases, from the fact—either proven or presumed from the nature of the transaction—that each of the contractors had the benefit of the money advanced, or that the joint obligation has been given to pay an antecedent debt, for which all the obligors were severally liable. But "when the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived. (1 *Story Eq.* 163.) The general rule upon this subject seems to be well expressed in *Rawle on Covenants*, 578—"Whether the liability created by the the covenant be joint *or* several, or joint *and* several, obviously depends upon the terms in which it is expressed. Where an obligation is created by two or more, the general presumption is that it is joint, and words of severance are required in order to confine the liability of the covenantor to his own acts."

In support of the text the author cites among others, *Comings vs. Little* (24 *Pick.* 266.) In this case the court, say, "The distinction is this: Where a man covenants with two or more jointly, and the interest and cause of action of the covenantees is several, each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. But when two persons covenant jointly with another, a joint action lies for the covenantee on a breach of the covenant by one of the parties only, because they are sureties for each other for the due performance of the covenant."

In the case under consideration, the covenants are *joint*,—they are the *joint* contracts of Lownsdale and Coffin with Chapman. An action at law for the breach of these covenants could not be maintained against either of the covenantors separately. But this is a suit in equity, not for damages for a breach, but to declare the legal effect of the one covenant and obtain the specific performance of the other, as against the heir of one of the covenantors *on account of her interest in the land* embraced in the covenant of her ancestor. As appears, Coffin has no interest in the land and can claim none. At the date of these covenants, this was public land of the United States, and it must have been within the contemplation of the

parties, that if the property was subsequently acquired from the United States, it would be by one of the covenantors and not all of them. In such a case, I think the rule of law applicable to actions at law wherein the covenantee seeks to recover damages from the covenantors for a breach of the covenant, does not apply.

The defendant as heir-at-law of Lownsdale appears to have inherited a separate interest in the property in question, of which the complainant, by this suit seeks to obtain a conveyance, on account of the covenant of the ancestor. The suit is to enforce performance of this covenant, not as a whole but as a separate interest, which has descended to this heir, and as to such interest no other person is liable or interested as defendant; nor can such covenant be enforced in this particular against any other person, than this defendant.

Heir liable to perform, though not named in covenant.

Counsel for the defendant, also object, that the heir is not liable upon these covenants, because not named therein. The authorities cited in support of this position, are cases that arose under the ancient feudal warranty, and not the personal covenants contained in modern conveyances. Common law warranty was created without covenant, and was a natural incident of the feudal tenure. By the joint operation of the Statutes *de bigamis* and *quia emptores*, the law was changed so that this warranty did not have the effect to bind the heirs unless mentioned in it. (*Rawle on Covenants*, 2, 3, 203.) The authorities cited refer to this kind of warranty and are not applicable to the case under consideration.

The covenants in this deed are deemed to run with the land, "and pass to the heirs of the purchaser and also to all persons claiming under him, who may maintain actions against them, against the vendor *or his heirs.*" (*Cruise's Dig. Ti* 32, *C.* 26, *Sec.* 66.) In support of this rule the author last quoted cites from 4 *Ves.* 370, as follows: "Rachel Boyes and her son conveyed a copyhold estate to a mortgagee, by lease and release and covenanted for further assurance. The son died; and the mortgagee filed his bill against the customary heir of the son, who was an infant; praying that he might be decreed to surrender the estate to the plaintiff. The Master of the rolls (Sir. R. P. Arden) said, he was clearly of the opinion, that this

covenant was a contract for a valuable consideration, *affecting the land and would affect the heir.* And by the decree it was declared, that the covenant in the mortgage deed bound the land descended to the defendant."

To the extent which these covenants affect the land, the heir is bound by them, though not named in them, so far as any interest which she may have by descent from the covenantor. Being so bound, the grantee or his assigns are entitled to maintain this suit against the heir, as they would against the ancestor if now living.

**Covenant divisible, and attaches to each parcel into which the original tract may be divided.**

Counsel for defendant further objects that the complainant is not the assignee of the covenants in the deed, because he is the grantee of only one half of the premises embraced in the deed and to which the covenants relate. This objection rests upon the consideration that the covenants ought not to be subject to a multiplicity of separate suits, by subsequent grantees of separate parcels of land, which he conveyed and covenanted concerning as a whole. But the law after some fluctuation, seems now to be well settled otherwise.

In 2 *Washburne's Real Property*, (662,) the author says: "the action for breach of this covenant (of warranty), should be brought by him who is the owner of the land, and, as such, the assignee of the covenant, at the time it is broken. Such covenant is moreover *susceptible of division into as many parts or interests*, as the land itself shall be divided into by subsequent successive conveyances, so that if A convey to B two parcels by one deed, with a covenant of warranty, and B sells one of them to C who is evicted by an elder title of the parcel so purchased by him, he may have convenant in respect to the same against A." The same rule is laid down as to *all* the covenants which run with the land in *Rawle on Covenants*, 354-5. Rawle cites the opinion of Lord St. Leonards (*Sugden on Vendors*), and says "this view of the law has been adopted in this country." The opinion cited was upon a similar case to the one put by Washburne. "The better opinion seems to be, that an alienee of one of the estates could maintain covenant against the covenantor where the covenants run with the land, and as such, an action would lie either for damages, which would be measured by the loss of the assignee, as far as he

might be entitled to recover it under the covenant, *or for an act to be done, e. g. further assurance, which might be confined to the particular proportion of the property.* It does not seem that any injustice would arise by suffering several covenants to lie, although it might expose the covenantor to inconvenience; whereas the denial of the right to each assignee might lead to positive injustice, or if not, to greater inconvenience on their part."

Nancy did not take under the settlement of first husband.

One of the grounds for the relief prayed for in the Bill, is that Nancy did not take any share or interest in the donation of Daniel H. and therefore Daniel H. acquired the whole of such donation from the United States, including the premises in controversy. The reason alleged, is that Nancy was entitled to a share of the donation of her former husband—Gillihan, and therefore *disqualified* to take a share of the donation of Daniel H. on account of the proviso to section 5 of the donation act: "That no person shall ever receive a patent for more than one donation of land in said territory in his or her own right."

Donation act did not comprehend persons not then in being.

From the statements in the Bill it appears that Gillihan had not completed his four year's residence upon the land on Sauvie's Island at the time of his death, so as to entitle Nancy to claim as his wife under section 4 of the donation act; and moreover Gillihan being dead at the passage of the act—September 27, 1850—was not comprehended in the grant made by said section 4, and therefore Nancy could not claim a donation as his wife in the land occupied by him during his life. This question must be considered as not open to argument in this court, and needs no further discussion. (*See* 1 *Oregon R.* 166, *and Lamb et al. vs. Starr et al., decided at the present term of this court.*)

One half of the donation to a married man enures to his wife be the same more or less.

But the complainant further contends that Nancy was not entitled to take a share of the donation of Daniel H., because such donation only included the number of acres (320) which he was entitled to hold as a single man, but that if she is allowed to take in such donation, she must take subject to the acts and contracts of Daniel H. before her marriage with him, and of which she *then* had notice.

The facts stated in the Bill, from which this conclusion is drawn, are, that Daniel H. settled upon his donation in 1848, and that it

contained less than 320 acres. That in 1850 he married Nancy—prior to the passage of the donation act and after the deed to Chapman, of which she *then* had notice.

Upon the first part of this position arises the question:—Can a married man exclude his wife from the benefit of the donation provided for her in section 4 of the donation act, by simply limiting his settlement to the quantity of land thereby granted to a single man; or in other words can a *married* man claim and receive a grant as a *single* man? The language of the section is:—"There hereby is granted to every white settler * * the quantity of one half section, if a single man, and *if a married man* * * the quantity of one section * * *one-half to himself and the other half to his wife*, to be held by her in her own right."

The evident policy of the law was to give to husband and wife an *equal* quantity of land—imposing upon the husband, as the head of the family, the burden of performing the services upon which the grant is conditioned, coupled with the right of selection, within he limits of the act, as to place and quantity.

The settlement of a married man is intended for the benefit of his wife as well as himself—to enable her to obtain her equal share of the bounty of the grantor. A married man may occupy less land than the law permits. He may have good reasons for so doing. A particular half section may be deemed of more value than any whole section, open to settlement. In this respect the act commits the interest of the wife to the judgment and thrift of the husband. But he cannot change the law and elect to take as a single man to the exclusion of his wife. The exclusive power of the husband is confined to the selection and location of the land. In any event the land embraced in the settlement, whether a whole section or less, is granted to the husband and wife in equal parts. Even the division of the donation is beyond his control, as the act vests the power "to designate the part enuring" to each in the officers of the Land Office.

**Wife takes from the U. S., and her interest not affected by husband's contracts.**

Neither did Nancy take her half of the donation subject to the deed of her husband to Chapman, whether she had notice of it or not. At the date of the deed and the marriage, this was public land of the United States. None of the parties had any interest in it, or claimed any power over it beyond the bare possession. Subsequently, Congress by statute granted the west half of the

donation to Nancy *in her own right.* These words—"to be held by her in her own right," were not inserted in the act without a purpose. It appears that they were placed there for the express purpose of excluding the conclusion, that she took in right of or through her husband, and that therefore she would take subject to the previous acts and contracts of her husband—as an heir from an ancestor or a vendee from a vendor. True, the services upon which the grant is conditioned, are to be performed by the husband, yet by the terms and manifest intention of the act, the wife takes and holds as the direct donee of the United States, as much as though she was a stranger to the husband. Under these circumstances Daniel H. had the same power to affect or encumber his neighbor's donation, by a deed to Chapman, as his wife's. The question of notice is immaterial, as there is no privity between Nancy and her husband. (*Carter v. Chapman, Oregon R.*, 1866.)

Grant takes effect from date of act, if settlement prior thereto.

Neither did the grant relate back to the date of the settlement by Daniel H., in 1848, so as to give effect to his deed to Chapman, before Nancy became his wife. The grant was subsequent to the marriage, and, "Although the act of Congress grants the land on *account* of the prior residence and cultivation, the grant itself, cannot be said to take effect before it was made—the time of the passage of the act. A grant of land by statute for considerations transpiring years before, as for military services, takes effect from the date of the grant, and not the performance of the service. In point of time the grant and the cause or consideration of it, may be identical or widely separated." (*Chapman vs. School District No. 1, et al. C. C. Dis. of Oregon, Jan. Term*, 1866. 1 *Con. Ohio*, 492, 14 *John* 193.)

Subject of the covenants—situation of considered.

Before considering the nature and effect of the covenants in the deed, it will be necessary and proper to examine the condition of the subject matter described in the premises and the nature and extent of the interest thereby released, quitclaimed and confirmed. Covenants cannot enlarge the premises of a deed, but the latter may and often do control the former. "The covenant of warranty is often limited and defined by the subject matter of the grant, as where the deed only purports to convey the right, title and interest of the grantor." (2 *Washburne's Real Property* 665, 12 *Pick.* 66, 67, 13 *Ibid.* 120).

Grantors in deed only had posses-

From the language of the Bill it might be inferred that the

sion, with expectation of title from the U. S.

grantors in this deed undertook as owners of the *land* to convey the *land*, and that the grantee accepted the conveyance upon the faith of this undertaking or representation. But nothing would be more erroneous than this impression, or more unjust to the parties concerned. As a matter of law and public history, it is well known to the court, that at the date of this deed the title to lands in Oregon was in the United States, and that no law had been passed to dispose of it. This was as well known to the people of Oregon at that day—the parties to this deed included—as that they were living in a territory and not a state. At the same time these lands were freely occupied by the inhabitants of the country, holding, as between themselves, under the laws of the provisional government, the bare possession. It is also true, that at the date of this deed and for years before, it was confidently expected that Congress would—as they afterwards did—pass an act donating these lands to actual settlers. In June 1850, the matter was specially before Congress, and the result, was the passage of the donation act in September following.

Under these circumstances this deed was made, and it is unreasonable to suppose that it was either executed or received upon the impression that the grantors were the proprietors of the soil or had any interest in it—particularly when it appears that Chapman, the grantee in the deed was in *fact* one of the grantors and parties in possession. But the most casual examination of the deed itself, will show this to be so. The operative words in the premises of the deed are those of release and quitclaim. And although by the deed as set forth in the Bill, the grantors "released, quitclaimed and confirmed" the *block of land* to the grantee, yet the natural and legal import of these words is not to assert that the grantors had then any particular estate or interest in the land. This taken in conjunction with the historic fact, that the grantors had then nothing in the block, but the possession, with what may be called an expectancy of title from the United States, it may be safely concluded that the deed only passed the actual interest of the grantors —the possession. This was all the grantee took or could have expected at the time; and this is evident from the covenants which he took as security for the future.

Nature and extent of covenants in deed.

These covenants are two in number and both special or limited. The first is a warranty against all claims—*the United States excepted*;

and the second is for special further assurance—that *if* the grantor *should* obtain *the fee simple from the United States*, they would convey the same to the grantee by deed of general warranty. The title of the United States is excepted in the covenant of warranty and in the covenant for further assurance, it is plainly asserted that the title was then in the United States. By this deed only the right to the possession—the then estate of the grantors—passed to the grantee. By the first covenant Daniel H. and those claiming under him are rebutted from claiming any interest in the premises, however acquired, except an interest or title derived from the United States. The title of the United States being expressly excepted from the operation of the warranty, Daniel H., if living, would not be prevented thereby, from asserting such title to the land, if by any means he should acquire it. The same is true of his heirs the present defendant. This covenant is exactly similar to the covenant in *Cole vs. Hawes*, (2 *John cases*, 203), which was to warrant the bargained premises against all claims, *except the lord of the soil*. In that case the court held that the warranty did not extend to the title or claim of the lord of the soil—the owner of the fee simple. So here, the title of the then lord of the soil—the United States—is excepted from the warranty. As it appears from the Bill, that the alleged interest of the defendant in the premises is derived from the United States, it is not within the warranty of her ancestor, nor in any manner affected by it. Upon this covenant the complainant is not entitled to any relief against the defendant.

Covenant of warranty—effect of.

The second covenant, binds Daniel H. if he should obtain the fee simple from the United States to convey the same to the grantee. This covenant is binding upon all persons claiming by, through or under Daniel H. It being decided that Nancy took a share in the donation of Daniel H., it is admitted that the latter never acquired by any means, more than an undivided two-fifths of the premises in question, and that of this interest he died seized, and it descended to his heirs-at-law.

Covenant for further assurance.

If Daniel H. obtained this interest *from the United States* it is within the covenant, and his grantee is entitled to a conveyance from the heirs, but if he did not, it descended to the latter unaffected by the covenant.

What interest within the covenant for further assurance.

As to the acquisition of these two-fifths, the case is this—Nancy having died intestate, before the issuance of the patent,

her share of the donation, by direction of section 4 of the act, went to Daniel H. and her four children in equal proportions. Some years afterwards, Daniel H., purchased the interest of Isabella Ellen, one of these children.

The purchase from Nancy's heir, not obtained from the U. S.

The fifth purchased from Isabella Ellen, was not obtained by the covenantor *from* the United States, and is therefore not within his covenant to convey.

As has been shown, at the date of this deed, it was expected that Congress would or might *give* this land to Daniel H. Upon the faith of this expectation, Chapman took this deed of release to himself, with the covenant of further conveyance, if this expectation should be realized. Beyond the right to the possession, as against the grantors, Chapman took nothing by that deed but a possibility —*the promise of a chance*—that if Congress gave the land to Daniel H., the latter would convey it to him, his heirs, or assigns. This must have been the understanding and intention of all the parties to the deed at the time. Upon this contingency the deed was made and the covenants entered into. As to this fifth, the chance failed—the contingency did not happen—and so far the covenant never became operative. Congress gave the land to Nancy, and she dying before patent, this fifth went to Isabella Ellen. The latter by this means became the absolute owner of this interest and could dispose of it as she saw proper. Waiving the question of whether she took as the *heir* of her mother or the *donee* of the United States, it is sufficient that she was neither the child or heir of Daniel H., and did not claim under or through him. Her interest came to her unaffected by any acts or contracts of Daniel H. When the latter purchased it, he in no sense obtained it from the United States, and was therefore not bound, either in law or morals, to convey it to the grantee in the deed of June, 1850. (2 *Washburne's Real Property*, 665, 13 *Pick*, 119, 12 *Pick*, 66, 6 *Mass.*, 250, *Rawle on Cov.* 192.

Daniel H. took as the donee of the U. S., and not as the heir of Nancy.

As to the other fifth, the solution of the question is not so apparent and simple. After careful consideration of the authors and authorities upon the subject,—keeping in view in the meantime, the expectation and intention of the parties to the deed, I have concluded that Daniel H. took this interest,

not by descent as the heir of Nancy, but directly from the United States, as its donee.

There are only two ways of acquiring real property, one by *descent* the other by *purchase*. If a person does not take *as heir*, he takes by *purchase*, no manner how he acquires his title.

At the death of Nancy—April 15, 1854—there was no statute in Oregon regulating the descent of real property, or declaring who should be the heirs of an intestate, and therefore the subject was regulated by the common law. By this rule, her children were first entitled to take as heirs, and her husband never. The donation act does not prescribe who shall be considered the heirs of a deceased settler or his wife, any more than it prescribes who shall be considered the *wife* of a settler. Both these subject are left to the local law—the law of Oregon.

Not within the rule in Shelley's case.

Counsel for the defendant, maintain that this grant is within the rule in Shelley's case, and that therefore Daniel H. must be considered as taking by descent from Nancy and not by purchase from the grantor—the United States. The rule in Shelley's case, as a law of property, has always been in force in this State as a part of the common law, except as to devises by will.

If the present case was within this rule, the consequences claimed by counsel would follow. Daniel H. would be considered as taking by descent from Nancy. This being so, he could not be said to have obtained this interest *from* the United States, and therefore it would not be within the operation of the covenant for further conveyance.

Courts and commentators have differed as to the reasons of the rule in Shelley's case, some resting it upon grounds of feudal policy, others upon the policy of the law which prefers descent to purchase, or the technical doctrine of the common law, which would not allow that the fee could be in abeyance —not vested in some one. But it is agreed on all hands, that it is a purely artificial rule, often in direct opposition to the real intent of the grantor or donor, and therefore not to be extended by analogy.

By the rule in Shelley's case, if a grant was made to a person for *life*, with remainder to *his heirs* in fee or tail, such person, notwithstanding the words of the grant to the contrary,

was deemed to take an estate of inheritance, and might alien the fee and bar the heirs. If he died seized it descended to his heirs, but they were not allowed to take the fee, by force of the grant, as purchasers, but only as heirs, by descent from their ancestor.

But if the remainder is given to any other person than the heir of the first taker, or to such heir *with* another person, or to only a *portion* of the persons constituting the heirs of such first taker, the case is not within the rule, and the persons to whom the remainder is given take under the grant as purchasers. To be in by descent, a person must take as heir—in the quality of heir—and take neither more nor less than the law would give him as heir, independent of the grant. If by the terms of the grant the heir is to take exactly what the law would have cast upon him, on the death of his ancestor, the case is within the rule, and he is deemed to be in by descent, and not by purchase. You cannot by any grant or conveyance, provide that an estate, after the life of the first grantee, shall go in the exact line of descent, and at the same time the heirs be considered as in by purchase, and not liable to the incidents and burdens of an estate by descent. (*IV. Kent*, 215-232, 1 *Washburne's Real Prop.* 78, 2 *Jarman on Mills*, 178, *et seq.*, 7 *Met.* 171, 1 *Ohio Con.* 179.)

The grant to Nancy took effect from the passage of the act. It was not of an estate for life merely but of inheritance. Yet by the terms of the grant it was made liable to be determined by the happening of a particular event—namely, her own death before the issuance of the patent. The estate granted her was therefore, what the law calls a qualified or determinable fee, because, although it might have continued forever and descended to her heirs *ad infinitum*, yet it was liable to be determined—terminated—by the happening of this event, by which, its continuance or extent was limited. This event actually happened, and in contemplation of it, the act limited the estate in Nancy's share of the donation over to third persons in equal parts—her husband and children. Upon the determination of her estate in the land, the act in effect granted it over to these persons. Until this event, the husband and children, had a contingent remainder in the land, which thereupon

vested in them absolutely. This interest they took as direct donees of the United States by force of the grant, and not as heirs of Nancy, who left nothing for them to inherit, because, her estate in the land terminated with her death. They were in by purchase and not by descent. The husband and children derived their interest from the United States, and not from Nancy, and therefore there is no privity of estate between them. (*IV. Kent*, 9, 126, 2 *Washburne's Real Prop.* 224 *et seq.*

In support of the position that Daniel H. took by descent from Nancy, counsel for defendant have cited, *Frizzle et al. vs. Veach* 1, *Dana* 211, *and McNairs, Admr. vs. Hawkins*, 4 *Bibb.*)

The first case was this: in early days a person entered and surveyed a portion of the public land in Kentucky, and died before the issuance of the patent. In pursuance of the law in such cases the patent issued to the heirs of the person who located the land, afterwards execution issued against the estate of the deceased, and a question arose whether the land could be taken on the writ. If the heirs took as purchasers, of course the land was not liable for the debts of their ancestor, but if they took by descent it was. The court decided that the heirs took by descent. This is not a case in point. Under the system then in vogue in that country an entry and survey of a particular tract of land amounted to a purchase. Thereafter the locator had the equitable estate and if he died before patent, it descended to his heirs. It went to his heirs, as heirs, by force of the law of descents, and not by operation of the grant. Then they stood in his place and represented him and were entitled to the patent. (4 *Ohio Con.* 178.)

The second case so far as it bears upon this is directly against the defendant.

It was a devise to A and the children of her body lawfully begotten, forever, with provision that after the death of A, the children, whether sons or daughters, were to have the devise equally.

The court held that the estate was limited for life to A, with remainder to the children and therefore it came within the rule in Shelley's case, *but for two reasons.* The devise used the words *children* and not *heirs*,—a term of *purchase* and not *limitation.* It also gave the devise to the children equally, while the law

of descent at the time of the making of the will, cast the estate upon the males to the exclusion of the females and of the former preferred the eldest. The judgment was that the children took by purchase and not descent. The court said, "The manner in which the estate is limited over to them" (the children, contrary to the law of descent) "precludes all possibility of their taking by descent."

So in this case, the grant in section 4, limited the estate in the land granted, after the death of Nancy before patent, and without will, not to *heirs*,—those upon whom the law would cast it, but to her *husband and children*. Unless the law of descent, independent of the limitations in the grant, would have cast the estate upon the *husband* and *children*, and in the *proportions* which they took, they take by purchase—as donees of the United States. It is believed that no case can be found which does not agree with this proposition. In these respects a grant by the United States, is to be construed and have the same effect as that of a private person.

Grant in section 4, to be construed as a conveyance.

The grant in section 4 is not couched in the language of a conveyance, though it must operate and be construed as one so far as practicable. When it provides that upon the death of Nancy, before the issuance of the patent, her husband and children *shall be entitled to the share or interest* in the donation, before granted to her, it may admit of argument whether they take such share by way of remainder or conditional limitation, after the determination of what proved to be only a life estate in Nancy. This is an abstruse branch of the law and one that has in times past been fruitful of unprofitable subleties. The question is not material here, for in any view of the case there can be no doubt, that the grant is not within the rule in Shelley's case, and that the material conclusion arrived at, is correct,—that Daniel H. took this fifth as the donee of the United States and not by descent from Nancy. He was not an heir of Nancy and could not inherit from her. The donation act does not pretend to make him her heir or call him such, and should not be so construed, in the absence of clear and express language to that effect. The object of this act was to make grants of land to actual settlers in Oregon, and not to establish or change the law of descent. The power over this subject, as "a rightful subject of legislation," had been already delegated to the territorial legislature. (9 *Stat.* 323, *Sec.* 6 *Organic Act.*)

Had the gift been to Daniel H. of the whole interest of Nancy,

upon the contingency that she died without children, it would not be different in legal effect from the case under consideration. Yet the survivor, so far from being thereby made an heir, would take in opposition to and exclusive of *the heirs*. Even if he only was admitted to take an equal proportion *with* them, he would thereby take so much *from* them. The estate would not go in the ordinary line of succession. The survivor takes that which the law of descent would give to the heirs, and the latter take so much less than they would if claiming *as* heirs. This being so, neither of them take in the character or quality of heirs, but as donees from the United States.

It is also evident, that the purpose of Congress was, in case of the death of the settler or his wife, without will, between the date of the act and the issuance of the patent, not to allow the share of the deceased to descend to his or her heirs generally, but to give it first to certain members of the family without reference to the local law of descent. Independent of the intrinsic justice of this provision, it might have been dictated by a desire to prevent any uncertainty concerning the condition and disposition of the grant, if the grantee should die before patent.

With the conclusion now reached, coincides the justice and equity of this case. As to this fifth, it was obtained by Daniel H. under just such circumstances, as the parties to the deed contemplated when this covenant was made and accepted—by gift from the United States. The complainant as the assignee of Chapman is entitled under the second covenant to a conveyance of this fifth, from the heirs or grantees of Daniel H.

Before leaving this subject, it is proper to notice some minor objections to the enforcement of this covenant, insisted on by counsel for defendant.

Covenant for further assurance, what constitutes breach of, and demand for performance.

It is claimed, that there is no breach of the covenant for further assurance, because it does not appear that the complainant has devised or demanded any particular assurance or conveyance. Where the covenant is general and does not specify the particular conveyance to be made, but only such as may prove necessary or be advised by counsel, the party claiming under it should demand such a conveyance as he conceives himself entitled to, or counsel shall devise, before he can allege a breach and maintain an action for damages. In such case, until the party bound to make further as-

surance is advised as to what is demanded or needed, he cannot be said to be in default for not performing it. This is the rule in actions at law for damages, which can only be maintained when an affirmative breach of the covenant is shown. But I apprehend it will be found, that the rule has little application to a suit in equity for the specific performance of a covenant. Such suit is not maintained upon a technical breach of the contract, but upon its continuing obligation, binding the party to perform it specifically. In the absence of any special provision in the covenant to the contrary, the suit itself is a sufficient demand for performance. This covenant is special and requires the performance of a particular thing—the conveyance of the property if obtained from the United States. A *neglect* to perform such a covenant, for the purposes of this suit, is equivalent to a *refusal* to do so. In this respect the covenant does not differ from an ordinary agreement to convey real property. (*Rawle* 199, *and note.*)

**Possession under deed sufficient estate to carry covenants therein, to subsequent grantee.**

It is also objected, that the defendant is not liable on this covenant to Chapman's *assignee*, because it does not run with the land. The reason given for this position is, that no estate passed to Chapman by the deed—the grantors not having any interest in the land at the time. This was the doctrine of the common law as to conveyances of estates less than freehold, which passed without livery of seizin. (*Noke vs. Awder*, 2 *Cro. Eliz.* 417, *cited in Rawle*, 383.) But as under our modern system of conveyancing freeholds pass without livery of seizin; it was held at one time that the doctrine became applicable to conveyances of such estates, and in case the grantor had no interest in the land, the assignee of his grantee could not sue upon the covenants, because they only passed as an incident of the estate. But this doctrine has been modified substantially, so that it may be said that whenever possession is taken under the deed, there is sufficient estate to carry the covenants to the assignee. (21 *Wend.* 123, 6 *Met.* 439, *Rawle*, 382, *et seq.*)

This doctrine is peculiarly adapted to the early circumstances of this country. For years before the passage of the donation act, the right of the settlers upon the land was a mere possession with an expectation of future title from the United States. Under these circumstances, in all the towns, this possession was conveyed and re-conveyed with covenants for the title expected, and it is proper and safe to hold with these authorities that a sufficient estate passed

to carry the covenants to the subsequent occupants and assignees.

Covenants in deed not prohibited by section 4 of donation act.

It is further objected to these covenants, that they are void, because they are contracts prohibited by the donation act. The second proviso in section 4 is relied on. It reads,—"That all future contracts, by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they have received a patent therefor, shall be void." Waiving the question of whether this prohibition extends to future contracts concerning lands which the covenantor might receive, but which eventually he does not acquire under the act and receive the patent therefor, it is plain that it does not include these covenants which were made *before* the passage of the act. It is a plain case for the application of the familiar rule—the mention of one excludes the other. The prohibition of *future* contracts, is a recognition and affirmance of *past* ones, otherwise lawful.

Deed not within act of Sept. 29, 1849, as to implied covenants.

Counsel for the complainant also insists, that independent of the covenants in the deed, Fields is entitled to the relief prayed for. In support of this position counsel cites section 6 of "An act, to regulate conveyances," the same being included in "An act, to enact and cause to be published a code of laws," passed September 29, 1849, and commonly called "the Steamboat Code." This section was in force at the date of the execution of the deed. It reads: "The words *grant*, *bargain* and *sell* in all conveyances, in which any *estate of inheritance, in fee simple*, is limited, shall, unless *restrained by express terms in such conveyance*, be construed to be the following express covenants on the part of the grantor for himself and his heirs, to the grantee, his heirs and assigns." Then follows the specification of the covenants—namely, of seizin of an indefeasible estate in fee simple—against encumbrances, and for further assurance. This section is taken almost literally from the statute of 6 Anne, c. 35, and was first introduced into the United States in the province of Pennsylvania. (*Rawle*, 533, 537.)

It is difficult to perceive, how it can be *even* claimed that this deed falls within the operation of this section. It does not contain the words, *grant, bargain and sell*, or either of them, or the equivalent of them, but the very reverse—*release, quitclaim and confirm*. The deed does not assume to pass or limit *an estate of inheritance in fee simple*, but as has been shown only

and the parties interested, must settle them among themselves, amicably, or by judicial proceedings, as may be found necessary or deemed best.

Apply this statement of the operation and effect of the decree in the partition suit, to the case of the complainant.

Complainant only took the interest acquired by his deeds, under the partition.

Block G is a part of the two-fifth tract, and the complainant claims the half of it. By the decree in the partition suit it is in no way ascertained or determined that the complainant is either heir, grantee, or assignee of Daniel H., or that he had any interest in the two-fifth tract. He brings this suit claiming to be entitled to the half of the block by virtue of the deed and covenants to Chapman and the subsequent conveyances to himself. He claims under these conveyances, and whatever interest he is entitled to, results from them and not the decree in partition. As has been shown, the complainant at the time of the decree had an equitable estate in an undivided one-fifth of the half block and no more. As to this fifth he is now entitled to a conveyance of the legal title from the heirs of Daniel H., by reason of the covenant in the deed to Chapman, and it may be assumed for the present that he has the legal estate therein.

Prior to and at the date of the partition the other four undivided fifths of the half block belonged—three-fifths to the children of Nancy, and the other fifth to the heirs of Daniel H. As has been shown, this three-fifths, was by the partition vested in the heirs of Daniel H., in consideration of their interest in the two-fifth tract being vested in the children of Nancy, and the payment of the owelty deemed necesssary to make the partition equal.

The interest of the complainant was not diminished or increased by the decree. The decree left him as it found him, except that it diminished the number of his co-tenants or persons with whom he held in common. Before the decree he was practically the owner of an undivided fifth of the half block, and his co-tenants and owners of the other four-fifths, were the children of Nancy and the heirs of Daniel H. Since the decree and by virtue of the decree, the heirs of Daniel H. are the owners of these undivided four-fifths, and the complainant is tenant in common with them alone.

It follows that the complainant acquired no further or additional interest in the half block by the partition. The nature or quantity of his interest has never varied or been affected by the partition and

exchange between the children and the heirs. He claims under the deed and covenant of Daniel H., and not otherwise. If by these he would have been entitled to the *whole* interest in the half block, as against Daniel H., or his heirs, the decree would have reserved it for him. But by the deed and covenant, he is only entitled to an undivided fifth of the half block, and the decree allotting this half block to the heirs and the complainant according to their *respective interests*, does not nor should not increase or diminish the interest of the latter. His *interest*, as *now* ascertained, was an undivided fifth, and he cannot take more, except at the expense of the lawful owners—the heirs of Daniel H.

Upon this point, the argument for the complainant is sought to be strengthened by appeals to the fact that he has made valuable improvements, and what is called in the statement of the Bill, "the equities in partition." But certainly this is all irrelevant and beside the matter in controversy. The complainant cannot enlarge his *interest in the land*, by making improvements upon it. This is not a suit for partition. When partition is sought between the complainant and his co-tenants, the heirs of Daniel H., it can be properly considered and determined, to what extent the former may be equitably entitled to have the value of his improvements estimated in his favor in the partition, provided his fifth cannot be set off to him so as to include them. In such suit, equity may also apportion the owelty charged upon the half block, so as to relieve the complainant's fifth from any part of it, if it should be found proper and equitable to do so.

The payment of owelty and effect of it.

The complainant to protect his interest from sale deemed it necessary to pay this owelty, and has paid it. Because, as he alleges, the defendant and her co-heirs suffered and encouraged him to pay the owelty, he claims to have acquired some additional interest in the half block. This claim is without any foundation in law. Whoever deemed it necessary to protect his interests in the land might pay the owelty, but he thereby acquired no right as against the real owner, beyond the right to be re-imbursed the amount paid for the benefit of the latter, with a lien upon the land as security. The decree in this respect, is too plain to be misunderstood. Whoever paid owelty, paid it upon his own judgment, and could not thereby acquire or affect the rights of others, whether they had notice of it or not. The owelty was not apportioned

among the *persons* who owned the two-fifth tract, for the same reason that the land was not—the court did not know or undertake to determine, who the owners were, or what was the relative or absolute proportion or quantity of their interests. The owelty was charged upon the land in gross, and not upon any portion of it or to any particular person. The land remains as a security to any one, who from necessity or misapprehension, may pay beyond the extent of his real interest. But whether a mere volunteer, who confessedly had no interest in the land, could claim this security, may be a question.

As between the heirs and the complainant it appears to me that no part of the owelty is chargeable upon the complainant's fifth. The cause of and consideration for owelty was the excess in value of the land which the heirs got in the partition, over that which they thereby yielded to the children of Nancy.

In a suit for partition between these parties, the court, upon this view of the case, ought to apportion the owelty, so as to discharge the complainant's fifth from any part of it, or by some means compel restitution or make compensation, for so much of the sum as has been paid on account of such fifth. This, it appears to me, is what equity would do in a suit for partition between these parties; but the occasion for furnishing this relief to the complainant does not arise in this suit.

This suggestion rests upon general principles, and is equally applicable to any distinct parcel of the two-fifth tract, upon which owelty was charged in gross, and which may be owned by the heirs and grantees of Daniel H. in common.

But there is a special circumstance in this case, which, as between the complainant and the heirs, must have the effect or operate to relieve or discharge the complainant's fifth from the owelty. The heirs are bound by the covenant of their ancestor, to convey to the complainant, his undivided fifth as their ancestor obtained it from the United States—free from encumbrances, or respond in damages for the breach of the covenant, so far as they have received assets. The owelty is an encumbrance, suffered during the time of their interest in the land, as heirs, and of which they have received the benefit.

Estoppel in pais.

The complainant also claims, that independent of the paper title

set forth, there has arisen an equitable estoppel *in pais*, sufficient to bar the rights of the heirs in any part of the premises.

The alleged declarations of Daniel H., and his and the heirs' notice of the complainant's possession and improvements and their acquiescence therein, are relied upon as constituting this estoppel. 2 *Amer. Lead. Cases* (754) upon the doctrine and effect of license to do some act or enjoy some privilege upon the land of another, is cited in support of this position. The authorities cited have no bearing upon the question; and moreover the facts alleged in the Bill, do not show even a license for any purpose.

This is a question of title—ownership of the soil, and not a mere easement or privilege. Titles would not be worth the paper upon which they are written, if they could be called in question or destroyed in this way,—by the proof of stale parol declarations inconsistent with or in opposition to them. As to these declarations, the dead cannot answer. If allowed to be shown, in bar of the acknowledged title of the ancestor, the heirs would hold their property upon the insecure tenure of the testimony of interested witnesses and claimants, as to matters resting only in parol, which if false or exaggerated, is incapable at this late day of either contradiction or explanation. This would be to offer a bounty for frauds and perjuries, instead of preventing them as the Statute of Frauds commands and intends.

In 1852, when complainant purchased from Dobleblower, this land belonged to Nancy. She was then living, and to whom it would go upon her death was not known to any one. She had the power of disposing of it by will. If she died intestate, and before patent, and Daniel H. survived her, he would be entitled to a certain interest in it, depending upon the number of children she left living. But at that time Daniel H. had no interest. Under these circumstances, he is said to have assured the complainant that *the title* was good, and thereupon the latter purchased of Dobleblower Waiving the question of *what* title is referred to by this ambiguous expression—whether it be that of Dobleblower, Chapman, Daniel H., or Nancy, this assurance amounts to nothing more than the expression of an opinion by a stranger—a person who had then no interest in the land and could not know that he ever would have. This expression of opinion as to the existing title—that it was good—could not create an estoppel against Daniel H. as to a subse-

quently acquired estate in the land. No special relation, implying trust and confidence, is shown or pretended to have existed between these parties. Daniel H. was not the guardian or attorney of the complainant. No misrepresentation of *facts* or concealment of them or fraudulent purpose is imputed to Daniel H. The complainant had the same means of knowing the state of the title that Daniel H. had. The latter is not responsible to the former for the correctness of his opinions about the title, even if these opinions influenced the complainant to make the purchase—which is extremely doubtful, even upon the face of the Bill. So far as Daniel H.'s opinions resulted in written acts—his deed and covenant—he is responsible and no further. If the complainant proposed to purchase upon the opinion of another as to *the title*, he should have taken the advice of counsel and not Daniel H. Of course the subsequent repetitions of this assurance by Daniel H. do not vary the effect of the first one. Moreover, they are perfectly immaterial in any view of the matter, as the purchase was made before they were uttered, and could not have been influenced by them.

As to the other branch of this alleged equitable estoppel,—the possession and improvements of the complainant—the case is equally clear against the complainant.

During the tenure of Nancy in the land, she was a married woman, and the complainant could not acquire any rights as against her, on account of her silence as to his occupation and improvements, whether she had notice of them or not. And if this were otherwise, the land did not *descend* from her, so as to be bound for her acts or omissions, in the hands of Daniel H. and the children. *Her estate* in the land terminated with her death, as well as her *enjoyment* of it. Thereafter a new estate in the land commenced in Daniel H. and the children, which they took directly from the United States. During the lifetime of Nancy, Daniel H. and the children had no interest in the land, and could not be affected by notice of possession and improvements, more than any other stranger. After the death of Nancy, they became the owners of the land, and were capable—except those who were minors—of affecting their interests by their acts and doings, so far as the law allows them to be sufficient for that purpose.

Possession with notice to the owner does not

But the whole idea upon which this branch of the case rests is a novelty and without the authority of law. It is, that the com-

plainant could acquire the title to this property as against the lawful owners, by being in possession and improving it, to their knowledge, for a less period than that prescribed by the statute of limitations. Mere possession, unless it be adverse and continued for twenty years, does not give *title* as against the owner. Possession is evidence of title, and sufficient evidence, in the absence of better. But here the title is shown beyond a doubt to have been in the defendant, and those under whom she claims, all the period of the complainant's possession, since the death of Nancy.

affect the interest of the owner, except by virtue of the statute of limitations.

The possession of the complainant, if adverse, might ripen into title by lapse of time, and in such case it would be immaterial whether any one had notice of it or not. For the same reason, if sufficient time has not elapsed to work a transfer of the estate by reason of the possession, the owner's right is not affected by the possession, however distinctly he had notice of it. As was said in *Chapman vs. School District, No.* 1., *et al.* (*Circuit C. Dis. Oregon, June Term*, 1866): "The owner of real property may rest upon his title, and is not required to be always upon the premises, asserting his right, as against the world or any less number of persons, whom he may permit or suffer from time to time, to be in the temporary occupancy or enjoyment of it."

Admitting then, for the present, that the complainant was in the adverse possession, and that Daniel H. had notice thereof from the time he became the owner of the land, it in no way benefits the complainant. It was the business of the complainant to know whether he was upon his own land or that of another.

But it is apparent and undeniable that the complainant's possession continued as it commenced, under the deed to Chapman and the mesne conveyances of Chapman to Dobleblower, and the latter to himself. By force of these, upon the death of Nancy, he became equitably entitled to an undivided fifth. Thereafter he was tenant in common with Daniel H. in his lifetime and his heirs since. His possession was not adverse to their title, or right, but consistent with it, and would not in any length of time affect their interest in the land. Tenancies in common, would be dangerous tenures, if one tenant could occupy and improve the other out of his estate,—particularly if that other was a minor, resident in another State.

It is also alleged that Daniel H. had notice of the complainant's possession when he purchased the fifth of Isabella Ellen, and there-

fore he and his heirs are estopped from asserting their title to such interest. How this can be, I cannot see. Daniel H.'s purchase of this interest, worked no wrong to the complainant. It was Isabella Ellen's property, and complainant, as against her, had no claim to it, either at law or in equity. She had an undoubted right to dispose of it, and Daniel H. to purchase it. If the complainant being in possession did not prevent her from selling, as it did not, it did not prevent Daniel H. from purchasing. If Isabella Ellen, had agreed by a valid contract to sell this fifth to the complainant, or had for any other reason been bound in equity to convey it to him, and Daniel H. had interfered and obtained the conveyance first, with notice of the complainant's possession, then, this matter of notice would be material. But as it was, it amounts to nothing. If one tenant in common cannot dispose of his interest to a person who has notice of his co-tenant's possession, estates in common would often be inalienable.

This I believe disposes of all the material questions raised and argued by counsel on the demurrer.

Decree, nisi. The demurrer is overruled, at the costs of the defendant, and unless leave is given to answer, there must be a decree for the complainant, that the defendant, by a proper conveyance with covenants of warranty, release to the complainant, her interest in the undivided fifth of the premises, which her ancestor obtained from the United States, and which she inherited from him.

DEADY, J.